

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

DR DISTRIBUTORS, LLC,) Docket No. 12 CV 50324
)
Plaintiff-Counterdefendant,) Rockford, Illinois
) Thursday, November 7, 2019
v.) 9:00 o'clock a.m.
)
21 CENTURY SMOKING, INC.)
and BRENT DUKE,)
)
Defendants-Counterplaintiffs,)
)
CB DISTRIBUTORS, INC. and)
9 CARLOS BENGUA,)
)
Counter-Defendants.)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE IAIN D. JOHNSTON
VOLUME 3 - PAGES 574 - 843

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18 MR. JOHN J. HOLEVAS
19
20 Also Present: MR. THOMAS R. LEAVENS
21 MR. TRAVIS W. LIFE
22 MR. STEVEN S. SHONDER
23 MR. PETER S. STAMATIS
24
25 Court Reporter: Heather M. Perkins-Reiva
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1 THE CLERK: Calling 12 CV 50324, DR Distributors,
2 LLC v. 21 Century Smoking, Inc.

3 THE COURT: All right. Let's get appearances.
4 Let's start with the Plaintiff.

5 MR. von OHLEN: Robert von Ohlen and Anthony Davis
6 for the Plaintiffs.

7 THE COURT: Good morning.

8 MR. DAVIS: Good morning, your Honor.

9 MR. LEONARD: Good morning, Judge. Mike Leonard,
10 Kevin Salam, and John Bisbikis for the Defendants.

11 THE COURT: Good morning.

12 MS. RICH: Trisha Rich --

13 MR. SMITH: -- and Colin Smith for the Leavens Strand
14 lawyers, your Honor.

15 MR. WOLFE: Mark Wolfe on behalf of Mr. Shonder.

16 MR. HOLEVAS: Good morning, your Honor. John Holevas
17 on behalf of Mr. Stamatis.

18 THE COURT: Good morning.

19 And I believe we left off with Mr. Duke.

20 And, Mr. Smith, you were going to start?

21 MR. SMITH: I believe so, your Honor.

22 There is an issue, I think.

23 MR. SALAM: A scheduling matter, your Honor, on
24 4Discovery.

25 THE COURT: Okay.

1 MR. SALAM: They are not available today. They are
2 available on the 19th.

3 THE COURT: Okay.

4 MR. SALAM: I had spoken with the owner prior to him
5 speaking with his lawyer. To make a long story short, after
6 our last hearing, I contacted -- or sent them an e-mail saying
7 "It doesn't look like there is time for you on the 7th," and
8 then the next e-mail I got was from their lawyer saying "Don't
9 talk to my client."

10 Things were worked out. I had communications with
11 them. I have been told by their lawyer that we can represent
12 to the court they will be available on the 19th. I will send
13 them a friendly subpoena just to make that less likely not to
14 occur.

15 THE COURT: Okay. All right.

16 Well, thanks for the information. I've set aside the
17 entire day today. We are going to go the entire day.

18 MR. SMITH: And we understand that, your Honor. I'm
19 just a little startled to hear about this this morning.
20 Mr. Salam has told me he has known about it for a couple of
21 days. There is kind of a lot of late surprises. We received
22 a number of exhibits at 5:30 and then almost 7:00 o'clock last
23 night, and I had thought that we understood the order of
24 witnesses, and from here on out, your Honor, I would at least
25 like to have a better understanding so that we are not

1 preparing for witnesses that are not going to be called on the
2 next court date.

3 THE COURT: And that's fair, and I think -- I don't
4 know if it made its way in the order, but I certainly have a
5 very distinct recollection of saying "You should let people
6 know who your witnesses are going to be the day before."
7 That's just common courtesy and good lawyering.

8 MR. von OHLEN: We have been advising -- and it was a
9 surprise to us, but we learned whatever yesterday, that they
10 weren't going to be here. We can't do anything about it. It
11 is not somebody who is within our control.

12 MR. SMITH: Well, that's startling to me because
13 nobody told us yesterday, and we spent some significant time
14 late yesterday preparing for a witness that we did not find
15 out until this morning would not be here. So advising some
16 counsel and not others is even more of a surprise to me.

17 THE COURT: Yes, I think everybody has got each
18 other's e-mails, right? So it shouldn't be too hard when you
19 get information about this to shoot out an e-mail saying "This
20 is what is occurring. Heads up."

21 MR. WOLFE: One final scheduling note when your Honor
22 has a minute.

23 THE COURT: Sure.

24 MR. WOLFE: When we received your court order about
25 the available dates, we sent around a myriad of court

1 orders -- and to your point, yes, we have each other's
2 e-mails -- I indicated that we would acquiesce to just about
3 anything, but Mr. Shonder and I are both not available next
4 Friday, and the lawyers said that's fine with them, they will
5 put him on the last day, assuming, your Honor, that was okay
6 with you that we could neither be present and have Mr. Shonder
7 go today or the last day.

8 So I'm asking your blessing to let us out those
9 days --

10 THE COURT: I'm not going to tell you folks how to
11 put your witnesses on, what order to put them on, and how to
12 introduce your evidence. That's not --

13 MR. SMITH: That's not --

14 THE COURT: Let me finish.

15 If we haven't figured this out, that interrupting me
16 is one way to set me off, there is a problem.

17 So I'm not going to tell you how to schedule your
18 witnesses, whether you should serve subpoenas, what order to
19 put them in, how to do your direct and cross-examinations.
20 That's all your job.

21 So I have given you time for this hearing, a lot of
22 time, on my vacation time, right? We are getting this thing
23 done. All right.

24 It could be a horrible, awful experience. It's
25 probably not a great experience for some of you right now, but

1 it doesn't have to be any worse. The way to make it worse is
2 surprises.

3 Anybody else getting tired of getting the documents
4 at the last minute? Kind of surprising? The word "irony"
5 gets misused a lot these days, but finding documents now,
6 that's a problem.

7 So having said that, Mr. Duke will resume his
8 testimony.

9 Mr. Smith -- or Ms. Rich, go ahead.

10 MS. RICH: Yes, I have one more thing, your Honor,
11 thank you.

12 Mr. Life has a childcare issue this afternoon, and I
13 have spoken to Plaintiff's counsel, and we have spoken to
14 defense counsel, and nobody seems to have an objection to him
15 leaving after 3:30, if it is okay with the court.

16 THE COURT: That's fine with me.

17 MS. RICH: Thank you, Judge.

18 MR. DAVIS: Just to be clear, what I said was we are
19 following the order of our witnesses on our exhibit list.

20 THE COURT: Okay.

21 MR. DAVIS: And Ms. Liberman has already been
22 excused, so Mr. Life would be the next witness if we get to
23 that today.

24 THE COURT: And then in light of -- you probably
25 thought that 4D was coming out today.

1 MR. von OHLEN: We thought we had 4D.

2 So Mr. Leavens is -- it's no mystery we are going to
3 call people in the order that we gave the witness list. We
4 told everybody that from day one. Unless there is some real
5 surprise, that's going to be the order. So Mr. Leavens is
6 going next, and Mr. Life is going after that, and Liberman is
7 going after that.

8 THE COURT: Okay. Then people can't grumble about
9 that. There it is. You've got it. Okay.

10 So, look, I don't know how long it is going to take
11 with Mr. Duke. I have got some estimates. We will go with
12 that. Obviously, 4D is not here. They are not physically
13 present. We will plow through and keep going.

14 I have got two quick criminal statuses at 11:00.

15 Mr. Holevas may know that the chili cook-off is
16 tonight. He will probably have to take a pass on that because
17 of this case.

18 But we are going to go to 5:00, okay?

19 Everybody okay with that up in front?

20 Okay. All right.

21 MS. RICH: Thank you.

22 THE COURT: Thank you.

23 All right. Remember you are still under oath.

24

25

1 BRENT DUKE, PLAINTIFF'S WITNESS, SWORN PREVIOUSLY

2 CROSS-EXAMINATION (Continued)

3 BY MR. SMITH:

4 Q. Good morning, Mr. Duke.

5 A. Good morning.

6 Q. Are you ready for some more questions?

7 A. Yes.

8 Q. Okay. Let's start by talking a little bit about your
9 intentions in this case, and let me start here: Did you ever
10 intend to produce anything less than all of the documents and
11 records and ESI you had under your control that might be
12 pertinent to the issues in this litigation?

13 A. No.

14 Q. And let me ask it another way: Did you ever intend to
15 produce anything less than all of the documents and records
16 and ESI that you had under your control that were called for
17 by the discovery in this case?

18 A. No.

19 Q. Now, my important question: Did you ever intend for your
20 lawyers to produce less than the entire universe of records,
21 documents, and ESI, except for what might be privileged?

22 MR. DAVIS: Objection, foundation.

23 THE COURT: I don't know if the question was even
24 done yet.

25 Was the question finished?

1 MR. SMITH: Yes, sir.

2 THE COURT: Okay. Overruled.

3 THE WITNESS: No.

4 BY MR. SMITH:

5 Q. Did you ever ask your lawyers to do anything other than
6 produce everything?

7 A. No.

8 Q. Did your lawyers, including Mr. Leavens, Ms. Liberman, and
9 Mr. Life, ever suggest to you that they wanted to produce less
10 than everything that was under your control that was called
11 for in discovery?

12 A. No.

13 Q. And as far as you know, based on working with them and
14 speaking with them, was it always the intention of your
15 lawyers to make full disclosure?

16 A. Yes.

17 Q. You never saw anything contrary to that?

18 A. Absolutely not.

19 Q. Now, let's go back to the beginning of this matter.

20 It's correct that you engaged Mr. Leavens and his
21 firm to represent you in this case in September of 2012,
22 right?

23 A. Correct.

24 Q. And that was after DR filed suit?

25 A. Yes.

1 Q. And based on listening to your testimony last Monday, it's
2 my understanding that you had given some focus to these
3 trademark issues even before that lawsuit was filed?

4 A. Yes.

5 Q. And were you already, even before DR filed suit, making an
6 effort to retain and hang onto all of your business and
7 company records, including electronic records and data, that
8 were related to the trademark issues?

9 A. Yes.

10 Q. And completely separate and apart from the trademark
11 dispute issues, I got the sense that it was your personal
12 practice generally not to delete e-mails?

13 A. Correct.

14 Q. Your personal practice was and is to be sort of a digital
15 pack rat?

16 A. Yes.

17 Q. Okay. So even prior to retaining Mr. Leavens in September
18 of 2012, you were already making it a point to try to hang
19 onto all the documents, records, information, and ESI you
20 might have that related to the trademark issues?

21 A. Yes. It's in my nature, yes.

22 Q. And that included all of your electronic information?

23 A. Yes.

24 Q. So that was your intention, and that's what you were
25 trying to do, even before you first met Mr. Leavens?

1 A. Correct.

2 Q. Fast forward now. Again, back up to the fall of 2012.

3 That's when you engaged Mr. Leavens, as we said?

4 A. Yes.

5 Q. And did you, at that time, tell Mr. Leavens that you were

6 already making an effort to preserve and maintain all of the

7 company's information and records that might relate to the

8 trademark issues?

9 A. Yes.

10 Q. So you told him going in that you were already doing that?

11 A. Yes.

12 Q. Okay. And you have already testified that you and

13 Mr. Leavens had discussions about preservation right at the

14 beginning, in your very first meeting, correct?

15 A. Yes.

16 Q. And Mr. Davis went over that very first meeting in some

17 detail and what you remembered about it several times, but to

18 summarize, Mr. Leavens told you first about what kind of data

19 you were supposed to preserve?

20 A. I don't recall exactly.

21 Q. Well, then, we will get to that in a minute.

22 But you understood it was every kind of data,

23 correct?

24 A. Yes. Everything, yes.

25 Q. Right.

1 And, in fact, second, you were to preserve -- and I
2 wrote your words down -- every single piece of data, correct?

3 A. Yes.

4 Q. And, third, that you cannot delete anything, right?

5 A. Yes.

6 Q. And, fourth, he told you that all of your data would
7 eventually be requested and searched, right?

8 A. Yes.

9 Q. So you knew that from the very beginning?

10 A. Yes.

11 Q. And last week, I believe you said you couldn't recall
12 whether or not Mr. Leavens used the term "ESI" in that first
13 meeting, right?

14 A. Correct.

15 Q. But Mr. Leavens did explain to you the concept of
16 electronically stored information and what it was at a very
17 early meeting, didn't he?

18 A. I don't recall exactly that.

19 Q. You don't remember testifying to that last week?

20 A. Maybe I'm not understanding your exact question.

21 Q. Well, let me just ask you if you were asked this question
22 last Monday and if you gave this answer. This is a question
23 from Mr. Davis:

24 "Q. And to be clear, when I say anyone, I'm
25 including your prior attorneys. They never explained to you

1 what electronically stored information was before August of
2 2019?

3 "A. They did explain to me what electronically
4 stored information was."

5 Do you recall giving that answer last Monday?

6 A. Yes.

7 Are we still talking about the first meeting with
8 him, though? That's where I'm getting confused.

9 Q. Well, I don't know if it was the first meeting or you also
10 talked about a very early meeting.

11 A. Okay.

12 Q. So if we include your very early meetings with
13 Mr. Leavens, he did provide an explanation of what
14 electronically stored information was, the concept, at least?

15 A. Yes.

16 Q. Okay. And as we said, you used the words last week you
17 were told to preserve every single piece of data, correct?

18 A. Yes.

19 Q. And so you knew it wasn't just e-mails. It was any kind
20 of data?

21 A. Yes.

22 Q. And you understood the concept was any kind of electronic
23 record along with all your paper records?

24 A. Yes.

25 Q. Okay. In fact, this "any data," that is actually

1 terminology you used twice last Monday, didn't you?

2 A. Possibly.

3 Q. Okay. But what you did say last Monday for sure was that
4 it was very clear to you what you were to preserve?

5 A. Yes.

6 Q. And you summarized it as "Don't delete anything, preserve
7 everything," right?

8 A. Yes.

9 Q. And you understood that's what you were supposed to do?

10 A. Yes, I did.

11 Q. And I think, as you put it last Monday -- and I wrote down
12 your words -- "I heard it and I understood it"?

13 A. Correct.

14 Q. You didn't need to get instructions in writing in order to
15 understand what you were supposed to do?

16 A. That's fair to say, yes.

17 Q. Okay. And those discussions you had with Mr. Leavens
18 early in the case, they weren't the only discussions you had
19 with lawyers at Leavens, Strand & Glover about the need to
20 preserve information and records, were they?

21 A. Was the -- can you repeat that?

22 Q. Yes.

23 Mr. Leavens wasn't the only Leavens, Strand & Glover
24 lawyer who talked to you about your preservation obligation,
25 was he?

1 A. I assume not. I don't recall exactly what discussions I
2 had regarding that.

3 Q. All right. Let's back up for a minute.

4 First of all, we know that Mr. Leavens gave you
5 instructions about preserving data on multiple occasions,
6 right?

7 A. That's fair to say, yes.

8 Q. All right. Now, you also talked about preservation with
9 Ms. Heather Liberman, didn't you?

10 A. I'm sure I did. I don't recall exact discussions about
11 it, but it's believable to me that I did, yes.

12 MR. SMITH: All right. Let's put up for a minute
13 Leavens Strand Exhibit 14, if we could.

14 THE COURT: You said 14, Mr. Smith?

15 MR. SMITH: 14, yes, sir.

16 THE COURT: Okay. Thank you.

17 BY MR. SMITH:

18 Q. And you see it on the screen in front of you?

19 A. Yes.

20 Q. And these are notes of a May 29, 2014, conference with
21 Brent Duke?

22 A. Yes, I remember seeing this document. I don't, like,
23 specifically remember this meeting.

24 Q. And you notice the first item on her list is "Confirm not
25 removing data," and there is a checkmark next to it?

1 A. Yes.

2 Q. All right. Now, I know this isn't your note, but this
3 isn't inconsistent with your recollection of the way the
4 Leavens, Strand & Glover lawyers treated this issue, is it?

5 A. No, that's fair to say.

6 Q. Yes.

7 So it is fair to say, and you are not at all
8 surprised by the notion that you had a discussion on May 29th,
9 2014, that, again, reiterated the instructions that you were
10 not to be deleting or removing any data?

11 A. No, that did not surprise me.

12 Q. All right. So this was an ongoing conversation you had
13 with the Leavens, Strand & Glover lawyers?

14 A. I see it here. I know we discussed it originally, and it
15 was on -- I wouldn't necessarily describe it as an "ongoing
16 discussion," but it is fair to say I understood it. I was
17 told on multiple occasions.

18 Q. Let me put it a different way.

19 It didn't just come up at the beginning of the case.
20 It was reiterated at times later in the case?

21 A. Yes.

22 Q. And not only by Heather Liberman, it was also reiterated
23 by Travis Life later in the case in conversations with you?

24 A. I don't recall.

25 Q. All right.

1 A. I'm not going to say it didn't. I do not recall.

2 Q. So you are not saying it didn't happen. You are just
3 saying you don't recall a specific conversation?

4 A. Exactly.

5 Q. Okay. So the bottom line is at various times, multiple
6 times, different lawyers at Leavens, Strand & Glover talked to
7 you about your obligation to preserve all documents and
8 records that might relate to the issues in this case?

9 A. Yes.

10 Q. And you fully understood that?

11 A. Yes.

12 Q. And you were already doing it anyway?

13 A. Absolutely.

14 Q. And as you said last week, and these were your words
15 again, there was no confusion there about the instructions to
16 preserve?

17 A. Correct.

18 Q. And focusing just on e-mails, last Monday, you told us:

19 "I have never deleted an e-mail."

20 Right?

21 A. Yes, other than spam, yes.

22 Q. Yes.

23 You did say later that you would delete junk mails or
24 spam e-mails, but in terms of substantive e-mails, you don't
25 delete them?

1 A. Period. I don't delete e-mails, no.

2 Q. Okay. And that was something you also had testified to,
3 as Mr. Davis brought out, in your June 2015 deposition
4 testimony also?

5 A. Yes, that would be accurate.

6 Q. And this wasn't just limited to you. For purposes of this
7 litigation, you extended that preservation obligation to
8 everyone with the company, didn't you?

9 A. Yes, to the best of my ability, yes.

10 Q. Well, your testimony last week was that you were telling
11 everyone with the company to save everything, right?

12 A. Everyone, yes, that I spoke with, yes.

13 Q. Yes.

14 And you said at Page 165 of your deposition, you also
15 said: "We tell everyone to save everything."

16 Do you remember testifying to that?

17 A. Yes.

18 Q. So your practice was to extend this out to your employees,
19 also, to make sure that they were preserving and saving
20 records related to the litigation?

21 A. All records, yes.

22 Q. Right.

23 And what you said last Monday was:

24 "I made sure everyone knew this whole time not to
25 delete anything."

1 Right?

2 A. Yes.

3 Q. So you understood that was an obligation that extended
4 beyond you, and you were communicating it over time to the
5 various employees of your company?

6 A. Yes.

7 Q. Okay. But in terms of the corporate stuff, the central
8 corporate records, that was really just you as the custodian
9 of those records, wasn't it?

10 A. Basically, yes.

11 Q. And that's what you said in your deposition. You said:

12 "In terms of the corporate stuff, it's just me, so I
13 know not to throw anything away."

14 Right?

15 A. Yes.

16 Q. And that's because you were pretty much the nerve center
17 of 21 Century Smoking, right?

18 A. Yes.

19 Q. You are the person who charted the strategy and made the
20 decisions?

21 A. Yes.

22 Q. And for that reason, pretty much all significant
23 information had to and has to flow through you?

24 A. Correct.

25 Q. And that's why when you were asked to search for

1 information related to this case, you really only searched the
2 three e-mail accounts that you personally used?

3 A. Exactly.

4 Q. And you testified last Wednesday that those accounts were
5 the only ones that you understood or expected to have
6 responsive information?

7 A. Yes.

8 Q. Okay. And that's because any information of any
9 significance at 21 Century Smoking ultimately flows through
10 you?

11 A. Exactly.

12 Q. Okay. So we have been discussing your intention and your
13 practice to preserve all e-mails and electronic information
14 since your first meeting with Mr. Leavens, and you also told
15 us that you heard and fully understood your obligation to
16 preserve that information, fair enough?

17 A. Yes, fair enough.

18 Q. And you would have done that regardless of whether or not
19 you got a letter or an e-mail reiterating those instructions,
20 correct?

21 A. Yes. I mean, yes, that was my policy, no matter what.

22 Q. You were already doing it?

23 A. I was doing it before. I do it now.

24 Q. And there would have been no change to that had you
25 received some instruction in writing. You would have been

1 doing it anyway?

2 A. I was already doing it.

3 Q. Okay. And you had already entered into a practice of
4 repeatedly or periodically telling your staff to do the same
5 thing?

6 A. Yes.

7 Q. Okay. And let's back up for a minute so that we get a
8 little bit of an understanding about 21 Century Smoking back
9 in this 2012 time frame, and, let's say, 2013, the early time
10 in this litigation. How many full-time managerial employees
11 did the company have at that time?

12 A. Two or three.

13 Q. Two or three.

14 You, correct?

15 A. Yes.

16 Q. Do you count your wife as one of those?

17 A. No.

18 Q. She's really part time also?

19 A. She's full time, but she wasn't really managing anything.

20 Q. Okay. She also takes care of -- you have a special needs
21 child she takes care of, right?

22 A. Exactly.

23 Q. Okay. But you were the only officer, the only director,
24 the only owner of the company, right?

25 A. Yes.

1 Q. Fair to say --

2 A. "Owner" -- I mean, there were people that co-owned stores
3 with me, so I don't know if "owner" is a fair statement.

4 Q. In terms of the company itself, you were the only owner,
5 but there were stores where some employees might have had some
6 ownership interest?

7 A. Exactly.

8 Q. But not of the corporate entity itself?

9 A. No.

10 Q. Okay. So at that point in time, and really the same is
11 true today, 21 Century Smoking was a small company, right?

12 A. Fair to say, yes.

13 Q. In fact, you have called it a very small company?

14 A. Depending on the time frame, yes.

15 Q. Yes.

16 You certainly said that in your deposition in this
17 case, correct?

18 A. Correct.

19 Q. All right. Now, if we go back to the beginning of this
20 case in 2012, what kind of assets did the company own at that
21 time?

22 A. The company has never really owned assets.

23 Q. Okay. It had an office, correct?

24 A. Rented.

25 Q. Was that office really at the two-flat where you also

1 lived?

2 A. Yes.

3 Q. Okay. That's 15-something North Ashland in Chicago?

4 A. 1535 North Ashland.

5 Q. Okay. And it's fair to say that that office, you had
6 control over all of the company's computers at that time?

7 A. Yes.

8 Q. And, actually, that has essentially been the case since
9 then, also, hasn't it?

10 A. Yes, it has always been the case, yes.

11 Q. Okay. And in addition to the other roles you've had with
12 the company, it's fair to say you were, effectively, the head
13 of IT also, weren't you?

14 A. Most of the time, yes.

15 Q. Okay. And as we said a few minutes ago, you were the
16 person in control of all of the company's corporate files and
17 records, right?

18 A. Myself and my wife, yes.

19 Q. Okay. And, in fact, last Monday, you testified just about
20 your computer and your wife's computer, and you said, "That's
21 where everything from our company is, basically."

22 Did I get that right?

23 A. Yes.

24 Q. Okay. And just so we are clear, back in this time frame,
25 when this litigation started, in terms of the various

1 functions of the company, you were in charge of strategy?

2 A. Yes.

3 Q. You were in charge of sales and marketing?

4 A. Yes.

5 Q. You were in charge of product supply?

6 A. Yes.

7 Q. You were in charge of determining what was in the product
8 line?

9 A. Yes.

10 Q. You were in charge of human resources, whether anybody got
11 hired or fired?

12 A. For the most part.

13 Q. Okay. You were in charge of finance?

14 A. Yes.

15 Q. And you also -- I guess you shared it with your wife, but
16 you also had a role in customer support and compliance?

17 A. Definitely, yes.

18 Q. It ultimately, I think, flowed up to you being really in
19 charge of any decision-making there?

20 A. Yes.

21 Q. In fact, we saw that you were personally involved in the
22 issues with Ms. Wood in those e-mails, correct?

23 A. I believe I'm one of the people on the replies, yes.

24 Q. You also replied to one of her e-mails, taking some
25 umbrage at the charges she had made?

1 A. I'm not sure if that's me, but, yes, it could be me on
2 that one, sure.

3 Q. Okay. Now, back in this time frame, in addition to
4 discussing preservation, you also had conversations with the
5 Leavens Strand lawyers about what e-mail accounts and what
6 electronic records were maintained by 21 Century, correct?

7 A. Yes.

8 Q. For example, you had some discussions about that with
9 Mr. Leavens at the beginning of the case, correct?

10 A. Yes.

11 Q. He made some effort to understand what was available, what
12 was under your control, correct?

13 A. Correct.

14 Q. Okay. And you had other conversations as the case
15 progressed, correct?

16 A. Yes.

17 Q. For example, these same notes we have in front of us,
18 Exhibit 14 -- if we can scroll up just a little more -- you
19 had discussions with Ms. Liberman in May of 2014, as the case
20 was headed toward large-scale document discovery, in which she
21 was communicating with you to assess what information,
22 materials, and e-mail accounts were available and at your
23 discretion, correct?

24 A. Yes.

25 Q. Okay. And you saw this last Monday, right?

1 A. Yes.

2 Q. And your recollection was that you had a conversation in
3 which you disclosed information?

4 A. Yes. I mean, I'm reading it. I can tell that, yes.

5 Q. Okay. But in any event, she inquired on those issues and
6 you responded?

7 A. Yes.

8 Q. Okay. Now, you have also, over the course of the case,
9 been repeatedly asked about the e-mail accounts you used,
10 correct?

11 A. Yes.

12 Q. And that's come up in this hearing several times?

13 A. Yes.

14 Q. And you have repeatedly identified the three accounts.
15 The brentduke@yahoo.com account?

16 A. Yes.

17 Q. The bduke@21centurysmoking.com account?

18 A. Yep.

19 Q. And I guess to a lesser extent, the
20 support@21centurysmoking.com account?

21 A. Yes.

22 Q. And those were -- based on the discussion, it appears that
23 you identified those same e-mail accounts to Ms. Liberman back
24 in your discussion with her in May of 2014?

25 A. Yes.

1 Q. Okay. And I asked you that question a couple minutes ago
2 about being, more or less, in charge of IT for the company.

3 Let me go on a little further and ask you a little
4 bit about your background with computers and electronic data.

5 Is it fair to say that you have a better-than-average
6 understanding of electronic communications and data?

7 A. That's hard to say. Better than average versus who?

8 Q. Well, and that's a fair response to my question, but you
9 don't feel like you know more than the average Joe on the
10 street about those issues?

11 A. Maybe more than the average Joe on the street.

12 Q. Okay. So let's get into that just a little bit.

13 You have actually had a little bit of formal
14 coursework in computer programming, haven't you?

15 A. In college, I took a class, yes.

16 Q. And you have also become familiar with some additional
17 computer programming languages or methodologies in the course
18 of some employment you have had?

19 A. No.

20 Computer languages?

21 MR. SMITH: Let's pull up the first session of his
22 deposition, June 16th, and Page 30.

23 BY MR. SMITH:

24 Q. Now, you identified in your deposition testimony some
25 familiarity with .html, correct?

1 A. Yes, that's the one from the class.

2 Q. Okay. And you identified some familiarity with
3 JavaScript, correct?

4 A. I know they exist.

5 MR. SMITH: Okay. Let's keep scrolling.

6 BY MR. SMITH:

7 Q. And in your deposition, you testified to some ability to
8 use .html, correct?

9 A. I can recognize .html, yes.

10 Q. Okay. But in any event, you also listed yourself as
11 proficient in some computer programming languages on one of
12 your resumes, correct?

13 A. Correct.

14 Q. Okay. And really, to get more back to where I'm going,
15 you have essentially made a career in the e-commerce field,
16 right?

17 A. What do you mean "made a career"?

18 Q. Well, your businesses -- your various businesses that you
19 have taken a shot at over time, a number of them have been
20 either web-based or placed a significant reliance on Internet
21 sales, correct?

22 A. One of them, 21 Century Smoking.

23 Q. All right. But you also started these other websites.
24 Now, maybe they never got off the ground, but they were also
25 intended either as marketing vehicles or potentially sales

1 vehicles of some kind that might attract interest over the
2 Internet, right?

3 A. If they ever become companies, yes.

4 Q. All right. Well, let's talk about Sports Doctrine for a
5 minute.

6 What was Sport Doctrine?

7 A. Like a sports social media site.

8 Q. And what was it intended to do or what service was it
9 intended to provide?

10 A. Just a place where you could post articles for different
11 teams.

12 Q. And was there some fashion in which you thought that that
13 website would eventually, potentially, make money for you?

14 A. Yes.

15 Q. Okay. So, again, that was an attempt to operate a website
16 for profit?

17 A. Yes.

18 Q. Okay. Now, you have had other websites like one called
19 "evtcigs," correct?

20 A. Yes.

21 Q. And what does that do?

22 A. I mean, I have the domain. It is not really a website.

23 Q. Okay. So that one never really went live?

24 A. I don't think so, no.

25 Q. Okay. How about Automatic Cigarettes?

1 A. That was a competitor that I purchased.

2 Q. All right. And was it ever a live website?

3 A. Yes, I bought it as a live website, yes.

4 Q. All right. And did you operate it?

5 A. Yes.

6 Q. And did you operate it for purposes of making money?

7 A. A small amount, yes.

8 Q. Okay. Again, using the Internet and a website to make
9 money, you understand that's e-commerce, right?

10 A. Yes.

11 Q. Okay. Now, what was wholesaleelectronics.com?

12 I assume it is unrelated to the vaping or
13 cigarette --

14 A. wholesaleelectroniccigarettes.com, I think.

15 Q. Oh, that's what it was.

16 Did you operate that as a website?

17 A. Yes.

18 Q. And did you make sales through it?

19 A. Maybe one.

20 Q. Okay. It wasn't as successful as you might have hoped,
21 but the intention was to make sales through it?

22 A. Yes, I never really put it in --

23 Q. Again, e-commerce?

24 A. Correct.

25 Q. Okay. In any event, by the time this litigation was

1 underway, you had been involved in the creation of and
2 operation of multiple e-commerce websites?

3 A. Yeah, I guess.

4 Q. Okay. Now, is it also true that early in this case, you
5 had conversations with Mr. Leavens, not just about what
6 records were under your control, but about where those records
7 were?

8 A. Yes.

9 Q. And that included electronic records, correct?

10 A. Correct.

11 Q. And you had those conversations, for example, in order to
12 prepare what we lawyers call "initial disclosure statements."

13 Do you remember hearing the term "initial disclosure
14 statements" in this case?

15 A. As I have been reviewing documents for this testimony.

16 Q. But you have seen it as you got ready for this hearing?

17 A. Yes.

18 Q. And do you recall that you were consulted with respect to
19 the content of the initial disclosure statements that were
20 filed on behalf of the Defendants in this litigation?

21 A. I remember discussing it. I don't remember the exact
22 terminologies that were used, but I remember discussing with
23 my attorneys disclosing documents.

24 Q. Okay. And when those were being prepared, do you recall
25 telling Mr. Leavens that the electronic records related to

1 your 21 Smoking -- 21 Century Smoking business were on three
2 or four computers located at your home office at 1535 North
3 Ashland Avenue in Chicago?

4 A. I have read that, so I don't have any reason to doubt it.

5 Q. So you do believe you told Mr. Leavens that?

6 A. I don't recall. I don't have any reason not to believe
7 it.

8 Q. Well, in fact, you reviewed the initial disclosure
9 statement that includes that language before it was filed,
10 didn't you?

11 A. I believe so, yes.

12 Q. Okay. And you ultimately approved exactly that language
13 to go in the initial disclosure statement, correct?

14 A. I believe so.

15 Q. Okay. You were actually provided with drafts, and the
16 drafts were run by you, and where you wanted to make changes,
17 you actually made changes in red line, correct?

18 A. I don't remember the specific documentation, but, yes, for
19 anything that was filed that related to me, I read it and made
20 changes, yes.

21 Q. Right.

22 And you never suggested any changes to the language
23 about the electronic records related to 21 Century Smoking
24 business being on the three or four computers at 1535 North
25 Ashland in Chicago, correct?

1 A. Correct.

2 Q. And you later discussed that same issue with Ms. Liberman
3 when there was about to be a collection of electronic data
4 related to the business, correct?

5 A. Correct.

6 Q. And you, again, identified that data as being on four
7 computers in your possession, correct?

8 A. Yes.

9 Q. Okay. And didn't you also on December 1st, 2014,
10 ultimately tell Ms. Liberman that "anything related to
11 21 Century Smoking" would be on the four computers in your
12 possession?

13 A. I don't remember that exact quote in 2014.

14 MR. SMITH: Could we have Leavens Strand Exhibit 13,
15 please.

16 And let's go back up to the top.

17 BY MR. SMITH:

18 Q. This is an e-mail from you on December 1st, 2014, to
19 Ms. Liberman, correct?

20 THE COURT: Hold on one second.

21 You said Exhibit 13, correct?

22 MR. SMITH: Yes, sir.

23 THE COURT: All right. Thank you.

24 THE WITNESS: Yes.

25

1 BY MR. SMITH:

2 Q. And what's happening here is you know that the Leavens
3 Strand lawyers are talking to e-discovery consultants who are
4 going to collect the electronic data so it can be searched for
5 purposes of this case?

6 A. Yes.

7 Q. And, ultimately, you know what they are doing is they are
8 going to run the Plaintiff's search terms against this
9 electronic data in order to provide the information or the
10 areas of information that the Plaintiffs believe might
11 potentially be relevant?

12 MR. DAVIS: Objection.

13 THE COURT: Hold on one second.
14 What's the basis?

15 MR. DAVIS: Foundation.

16 THE COURT: Ask the question with "did you know," and
17 then you can follow up.

18 MR. SMITH: Now I have to remember what it was, your
19 Honor.

20 Let me take a shot at it.

21 THE COURT: Okay.

22 BY MR. SMITH:

23 Q. Did you know that that information that was going to be
24 collected was going to be run against the Plaintiff's search
25 terms?

1 A. Yes, I knew they were collecting documents.

2 Q. All right. So you were in the loop to some degree,
3 at least, as this process was unfolding?

4 A. Yes.

5 Q. All right. And you knew that the purpose of it was to
6 gather up information that might fall into categories deemed
7 appropriate for discovery in this case?

8 A. Correct.

9 Q. Okay. And, in fact, you are in the loop here because it's
10 part of assessing what the cost of this search will be, right?

11 A. Yes, exactly.

12 Q. All right. And what you did is you provided information
13 about what's on these four computers, the volume of data on
14 these four computers, because this is the data that would
15 potentially be served up to search?

16 A. Yes.

17 Q. Okay. And what you say in the second paragraph is:

18 "Here are the total GB" -- gigabytes -- "on the four
19 computers that would have anything related to 21 Century
20 Smoking."

21 Right?

22 A. Correct.

23 Q. Okay. And when the company data on those four computers
24 was actually collected to be searched for purposes of this
25 case, you personally participated in that process, right?

1 A. What do you mean "personally participated"?

2 Q. Well, you knew that, ultimately, Leavens Strand had hired
3 4Discovery to do this search, right?

4 A. Yes.

5 Q. And they hired this e-discovery consultant to assist them
6 with the electronic discovery issues?

7 A. Correct.

8 Q. And they had interviewed several companies before settling
9 on 4Discovery.

10 You were aware of that also?

11 A. I saw that recently, yes.

12 Q. Okay. And the way that the collection process ultimately
13 worked was that 4Discovery sent you what they call "collection
14 drives" to your home in California, and you were personally
15 involved in connecting those to your computers in order for
16 the data on the hard drives to be downloaded?

17 A. Oh, yes, yes.

18 Q. All right. So you were the only person there connecting
19 up the computers to the collection drives and making sure that
20 the data flowed into the collection drives as requested?

21 A. My wife and myself, yes.

22 THE COURT: Hold on one second. Thank you.

23 (Brief pause.)

24 THE COURT: All right. Thank you.

25 MR. SMITH: Thank you, your Honor.

1 We are going to get up another exhibit here for a
2 minute.

3 BY MR. SMITH:

4 Q. I'm going to ask you to take a look at Plaintiff's
5 Exhibit 65, and we are going to put it on the screen so that
6 you don't have to see the one I spilled my coffee on at the
7 Belvidere Oasis this morning.

8 But if we go to the fourth page of that exhibit, this
9 is a letter from 4Discovery.

10 Have you seen this letter before, Mr. Duke?

11 A. In preparation for this.

12 Q. Okay. And that's fine.

13 But the point is in the second paragraph, Mr. Gough
14 of 4Discovery describes the process by which the data on the
15 hard drives of your four computers were collected on
16 December 9th, 2014, correct?

17 A. Okay. Yes.

18 Q. And in looking at that, you don't have any disagreement
19 with the description of that process, do you?

20 A. No.

21 Q. Okay. So you were there, your wife was there, you
22 connected the drives, and you followed their instructions and
23 downloaded the hard drive data from those computers onto those
24 collection drives?

25 A. Yes.

1 Q. And you knew that that data, what we lawyers call
2 "electronically stored information" or "ESI," that was all
3 that you transferred off the hard drives of those computers.

4 There wasn't anything more but what was on the hard
5 drives?

6 A. Yes.

7 Q. And you knew that's what 4Discovery was going to search?

8 A. Yes.

9 Q. And you also understood that 4Discovery did search that
10 material using the Plaintiff's search terms?

11 A. Yes.

12 Q. And that as a result of that, a large volume document
13 production was made in early 2015, correct?

14 A. Correct.

15 Q. Something approximating 50,000 pages?

16 A. Correct.

17 Q. Okay. So this might be a good time, while we are talking
18 about 4Discovery's search, to separate that a little bit from
19 the searches you have talked about in your testimony during
20 this hearing.

21 Are you with me?

22 A. Yep.

23 Q. Okay. So last week, you were asked a number of questions
24 about the various searches that your former lawyers asked you
25 to make at various times in the case, correct?

1 A. Yes.

2 Q. And I want to try to get some context around the
3 circumstances under which you were being asked to make those
4 searches.

5 Are you with me?

6 A. Okay.

7 Q. It's fair to say that early in the case, during 2013 and
8 2014, before there was large-scale document production in
9 early 2015, you were sometimes asked to make searches of your
10 records or your e-mails in order to understand what
11 information was available to respond to specific discovery
12 requests, correct?

13 A. Yes.

14 Q. Okay. You knew the Plaintiffs were propounding
15 interrogatories and production requests that each individual
16 request might address a specific issue, correct?

17 A. Yes.

18 Q. And at that time, before there was large-scale document
19 production, you were assisting by finding your records that
20 might be responsive to those requests?

21 A. Yes.

22 Q. Because the information was under your control, and you
23 had a very good knowledge of what it was and how to find
24 things, correct?

25 A. Yes.

1 Q. You might not have had the same level of knowledge your
2 wife had, but you also had familiarity with her foldering
3 system, right?

4 A. Yes.

5 Q. And that would make you a logical person to be involved in
6 collecting that information in response to specific requests?

7 A. Correct.

8 Q. Okay. Now, after your documents from the computers were
9 collected and searched by the e-discovery consultant,
10 4Discovery, there was this large-scale document production in
11 early 2015, right?

12 A. Yes.

13 Q. And in that same time frame and at times after that
14 large-scale document production, there were also times where
15 your former lawyers asked you to make searches to find
16 specific records that might relate to strategy decisions or
17 plans your lawyers were working on, fair enough?

18 A. Yes.

19 Q. So they are thinking about something they might do or some
20 step they might take in the case, so they would come to you
21 and say, "Hey, Brent, what do we have on X"?

22 A. Yes.

23 Q. Okay. So you knew you were getting requests like that
24 also, correct?

25 A. Correct.

1 Q. All right. They weren't just for purposes of producing
2 documents in discovery, but maybe for gathering information in
3 order to address a specific issue?

4 A. Correct.

5 Q. Or, for example, to prepare expert witnesses?

6 A. Yes.

7 Q. Okay. So that's a second area in which you did searches
8 in response to lawyer requests, both before the large-scale
9 production and after it, correct?

10 A. Correct.

11 Q. And, again, that's because despite the fact that the
12 lawyers might have this large collection of documents now, you
13 might be able to very quickly identify things or identify
14 things in folders that would easily provide information to
15 make a decision or chart a course of action?

16 A. Correct.

17 Q. Okay. Now, after that large-scale document production in
18 early 2015, you also -- well, let me just back up.

19 You understood that that large-scale production was
20 available not just to the Plaintiffs; it was also available to
21 your lawyers?

22 A. Yes.

23 Q. And you knew that your lawyers, and particularly Travis
24 Life, were able to search that production and identify what
25 materials might be in it?

1 A. I don't know the searches. I knew he had them. I
2 don't --

3 Q. All right. You certainly --

4 A. -- the details of how he interacted with them.

5 Q. I'm sorry. I cut you off.

6 A. I didn't know the details of how he interacted with them.
7 You are saying "searches." Like I don't know exactly what
8 they could do with them. I knew that there was a bunch of
9 documents.

10 Q. All right. You knew he had it and had access to it?

11 A. Yes, I believe he read through them, yes.

12 Q. And so after that large-scale document production was
13 available, you were also asked to make searches as a backup,
14 to find out whether it turned up anything different from what
15 Mr. Life had already turned up when he had searched the
16 existing document production. You are aware of that also?

17 A. Yes.

18 Q. Okay. So some of these searches that we talked about last
19 week weren't primary searches by you. They were actually
20 secondary searches that you made as a double-check after the
21 Leavens Strand lawyers had already searched the database?

22 A. I suppose some were, yes.

23 Q. All right. That's generally your understanding?

24 A. Yes.

25 Q. Okay. So it's not as if they were relying on you in the

1 first analysis. They were relying on you to determine whether
2 there was anything they should be concerned about in terms of
3 the completeness of the search they had already done, fair
4 enough?

5 A. Fair enough.

6 Q. Okay. For example, you knew that the reason Mr. Life
7 asked you in March of 2018 to search for Webrecsol -- I want
8 to say "Webrecsol" every time -- Webrecsol and Saraswat
9 materials was because he had already searched the document
10 production for those same materials and really hadn't found
11 much?

12 A. Can you repeat that?

13 Q. Yes.

14 You knew that the reason that you were asked in March
15 to look for Webrecsol and Saraswat materials was because there
16 was an allegation that more existed and Mr. Life had searched
17 the database and hadn't found much?

18 A. Yes.

19 Q. So he came to you and said, "Let's check this out. Let's
20 find out whether the Plaintiffs are right. We don't think
21 they are right, but let's find out," correct?

22 A. Correct, yes.

23 Q. All right. So that search that you then made was a
24 secondary search for those materials, correct?

25 A. Yes, that was my understanding.

1 Q. Because at that time the defense team's working assumption
2 was that everything should have been available, everything
3 should have already been found, correct?

4 A. Exactly, yes.

5 Q. All right. So this was a due diligence, double-check
6 search that you were asked to make, correct?

7 A. Correct.

8 Q. And when you made it, the materials were produced within
9 something like 48 hours?

10 A. Yes.

11 Q. Okay. Now, when you turned up 112 documents in that
12 search, Mr. Life told you he was surprised, didn't he?

13 A. I don't recall.

14 Q. You generally got the impression he didn't expect you to
15 find anything, right?

16 A. Yes.

17 Q. Okay. And by the way, let's put one issue to rest: You
18 had an e-mail exchange with Mr. Life, and you said, "I have
19 hundreds of Saraswat e-mails," right, before you made your
20 search?

21 A. Correct.

22 Q. And you have described that as an exaggeration or
23 hyperbole, correct?

24 A. Correct.

25 Q. When you made that statement, you didn't know how many you

1 did or didn't have?

2 A. That's fair to say.

3 Q. All right. Nevertheless, you searched, and everything you
4 found wound up being the 112 that you provided to Mr. Life?

5 A. Correct.

6 Q. Okay. So when you were talking about hundreds of e-mails,
7 you weren't attempting to make some hard estimate that you
8 were going to be held to?

9 A. Correct.

10 Q. Okay. Now, let me switch a little bit from e-mails to
11 chat or instant messaging functions.

12 You were asked some questions about that last week,
13 right?

14 A. Yes.

15 Q. About Yahoo! Chat and Gtalk?

16 A. Correct.

17 Q. And you testified last week that early in the case when
18 you were being told to preserve information that you were told
19 to preserve the chat data as well?

20 A. I don't recall being specifically told to save anything in
21 specific. I was told to save everything.

22 THE COURT: While you are looking for that, let me
23 ask you a question.

24 What folder or application or database or location
25 were you searching when you found these 112 Saraswat e-mails?

1 THE WITNESS: My Yahoo! e-mail account.

2 THE COURT: Yahoo! e-mail account, right?

3 THE WITNESS: Yes.

4 MR. DAVIS: I'm sorry. I didn't hear the answer,
5 your Honor.

6 THE WITNESS: My Yahoo! e-mail account.

7 THE COURT: Which at that point had not been copied,
8 correct?

9 THE WITNESS: Correct, and I believe there were,
10 maybe, four or five in the support@21centurysmoking e-mail
11 account as well.

12 THE COURT: Okay. All right. Just wanted to
13 confirm.

14 Go ahead.

15 MR. SMITH: No problem.

16 And we are going to talk a little bit about the
17 e-mails that were on the hard drives versus the e-mails that
18 weren't.

19 BY MR. SMITH:

20 Q. Because there were a substantial number of e-mails on the
21 hard drives, correct?

22 A. Yes.

23 Q. In fact, ultimately hundreds of e-mails were produced from
24 the hard drives, correct?

25 A. Yes.

1 Q. As part of that 57,000 -- I'm sorry -- 47,000-page
2 production?

3 A. Yes.

4 Q. Okay. So I was asking you about preservation of chat
5 functions, and last week, at Page 215 on the Monday
6 transcript, do you recall being asked:

7 "Q. Did you know back at the time when you were
8 being told to preserve the information that you were to
9 preserve the Yahoo! Chat as well?

10 "A. Yes, and I didn't delete the Yahoo! Chat. The
11 program just disappeared."

12 Do you recall that testimony?

13 A. Yes.

14 Q. Okay. So you did understand you were to preserve the chat
15 data to the extent it was available to you?

16 A. I understood to preserve everything, yes.

17 Q. All right. And you certainly understood that to include
18 the chat data?

19 A. Of course.

20 Q. Okay. And I kind of want to get a sense of when you used
21 these chat or instant messaging functions and what for, okay?

22 A. Okay.

23 Q. Well, the reason I ask that is when you were asked about
24 these messaging or chat functions last week, you referred to
25 one of them as "something I have not used in forever."

1 Do you recall testifying to that?

2 A. Yes.

3 Q. And let's start with Yahoo! Chat. When did you use that
4 for anything related to 21 Century Smoking?

5 A. Rarely would I have used it for anything related to 21
6 Century Smoking, but mostly it would have been in 2009 when I
7 needed assistance with the initial website.

8 Q. So it wasn't something -- after this litigation started,
9 it would have been extremely rare for you to have used it?

10 A. Extremely rare, yes.

11 Q. All right. In fact, another thing you testified to last
12 week is that 99.9 percent of your Yahoo! Chats were personal?

13 A. Fair to say, yes.

14 Q. Do you have a specific recollection of using the Yahoo!
15 Chat for anything related to 21 Century Smoking after this
16 litigation was filed?

17 A. No.

18 Q. Okay. How about Gtalk?

19 On Monday, I believe you said you didn't recall any
20 specific conversations on Gtalk.

21 A. No.

22 Q. You also said it was something you used very rarely,
23 correct?

24 A. Extremely rarely, yes.

25 Q. And I think you said all of it was 10 to 12 years ago?

1 A. For the most part, yes.

2 Q. Again, not holding you to that time period, but certainly
3 it would be before this litigation was filed?

4 A. Yes, it would have been rare before, and then extremely
5 rare after, if at all.

6 Q. Okay. And let me just ask you this direct question: Do
7 you recall ever using Gtalk for any purpose related to
8 21 Century Smoking?

9 A. I'm not saying it's not possible. I don't recall using
10 it, though.

11 Q. Okay. And more specifically, do you recall using it ever
12 in 2012 or after for 21 Century Smoking?

13 A. No, I believe in some e-mail documentation that showed up,
14 she said she was going to send -- Kirti said she was going to
15 send files through Gtalk or something. So that may or may not
16 have occurred, but that's the only thing that I recall at all
17 from Gtalk.

18 Q. Now, have you ever heard of these talk or chat or
19 messaging functions referred to as "ephemeral messaging
20 communications"?

21 A. No.

22 Q. Well, it is a reference that the lawyers use. There is a
23 lot of words lawyers use that don't make much sense to anybody
24 else. But the point is that at least some of these chat
25 functions don't last very long. They don't remain available

1 for very long.

2 A. Okay.

3 Q. And certainly some of these chat functions, I believe, you
4 testified in your deposition that the only reason you would
5 have a record of it at certain points in time is because you
6 made a screenshot and sent it to yourself. I think we saw
7 Exhibit 37 appear to be something like that.

8 A. Correct.

9 Q. Okay. And so at some time frame, the stuff didn't even
10 have its own existence for any period of time after the chat
11 ended unless you took a step to preserve it, correct?

12 THE COURT: Well, we need some serious foundation
13 because that's directly contrary to representations that have
14 been made to me in this case. So I need to know the basis for
15 any foundation for answering that question.

16 MR. SMITH: Well, I'm happy to just ask him about it,
17 your Honor, because I'm actually trying to clear the air on it
18 also.

19 THE COURT: Okay.

20 BY MR. SMITH:

21 Q. And let me try it this way: As I understood it, there
22 were times where Yahoo! Chat remained available to you, but
23 other times where, perhaps, it didn't. Did I get that wrong?

24 A. I mean, I am a digital hoarder, so I would have definitely
25 have done anything in my power to have kept it, if possible.

1 The only circumstance under which I wouldn't have kept it or
2 been able to keep it is if it was on a computer from somewhere
3 else when I was using messenger. I would have to e-mail it to
4 myself.

5 Q. Okay.

6 A. That's the only situation I can think of where it would
7 just disappear on its own.

8 I would have set all settings to save forever if that
9 setting existed.

10 Q. All right. That's what I was trying to understand.

11 And because we have this --

12 MR. SMITH: I believe it is Plaintiff's Exhibit 37.

13 THE COURT: You said Plaintiff's 37?

14 MR. SMITH: Plaintiff's 37.

15 THE COURT: Okay.

16 BY MR. SMITH:

17 Q. And it was pointed out last week, this exhibit is an
18 e-mail from you to you on the Yahoo! account, correct?

19 A. Right.

20 Q. So this apparently -- is this one of those chats on some
21 other computer where you would have had to do this in order to
22 save it?

23 A. It is a high likelihood of that, yes, or it was just
24 something that I wanted to have easy access to without
25 scrolling through all the other chats or all of -- going back

1 into Yahoo! Messenger and looking through it. I would -- this
2 says: "Chat with SEO examples of Kirti." So maybe I just
3 wanted those examples, and I wanted them readily available, so
4 I would have e-mailed it to myself.

5 Q. All right. So as I'm understanding this now, there is two
6 possibilities. One, this was on another computer, and you
7 needed to do this in order to save it, or this was something
8 you wanted to be more readily available to you than in the
9 chat part of the account?

10 A. Correct. So that would be slow, you know, to scroll
11 through a chat as opposed to just looking at an e-mail.

12 Q. Okay. Now, you testified last week that it was your
13 intention and your effort not to delete chats and to preserve
14 them, correct?

15 A. Correct.

16 Q. Okay. And at some point, Yahoo! discontinued its chat
17 service, correct?

18 A. Correct.

19 Q. And I believe that 4Discovery ultimately determined that
20 that service was discontinued sometime in July of 2018,
21 correct?

22 A. I don't know the exact date, but that sounds right.

23 Q. Okay. Did you get any advance notice that that function
24 was going to be discontinued?

25 A. I never saw anything.

1 Q. So as far as you can recall and as far as you were aware,
2 you didn't have any notice to do anything about that?

3 A. I never saw anything, no.

4 Q. And I believe you testified last week that you wouldn't
5 have wanted that to happen because you didn't want to lose
6 at least your personal chats?

7 A. Exactly.

8 Q. Okay. And let's turn for a minute to your testimony last
9 week about Mr. Leavens being present on one occasion at your
10 home office when you accessed some e-mail accounts.

11 Do you recall that testimony?

12 A. Yes.

13 Q. And what you said was he was there and he saw you do it,
14 right?

15 A. Yes, that's fair, yes.

16 Q. And that was near the beginning of the case. You said it
17 was late 2012 or 2013, correct?

18 A. Correct.

19 Q. And you said, also last Monday, this was the only time
20 that happened?

21 A. The only time what?

22 Q. That Mr. Leavens sat with you and looked at one of your
23 computers with you.

24 A. It's the only time I can recall, yes.

25 Q. Okay. And you were using your own laptop in your office

1 at 1535 North Ashland in Chicago?

2 A. Correct, yes. We were sitting at a table, correct.

3 Q. Okay. And to be clear, you told us Monday you didn't
4 actually explain to Mr. Leavens that you were accessing your
5 e-mail account online as opposed to looking at information on
6 the hard drive of the computer, right?

7 A. I don't recall specifically explaining it, no.

8 Q. Well, you actually said that you didn't use any words,
9 right?

10 A. Correct.

11 Q. Okay. Now, what Mr. Leavens was doing, among other
12 things, was trying to determine what folders and files and
13 electronic records you had at your disposal, correct?

14 A. Yes.

15 Q. Okay. And the fact of the matter is you never explained
16 to Mr. Leavens in words that the entirety of your e-mail
17 accounts could only be accessed online?

18 A. Correct.

19 Q. Okay. And obviously, you are not in any position to say
20 what he understood because you didn't actually have a
21 conversation with him about the concept of the accounts being
22 online?

23 A. Correct.

24 Q. And, more importantly, about the entirety of the accounts
25 being online?

1 A. Correct.

2 Q. Because certainly there were e-mails on your computers?

3 A. Yes.

4 Q. Okay. And, again, we discussed this a few minutes ago.

5 When you actually did use words to discuss the location of the

6 electronic data under your control, you said that everything

7 was on four computers in your possession, correct?

8 A. Correct.

9 Q. Okay. You told Mr. Leavens that when he was preparing the

10 initial disclosures, right?

11 A. Yes.

12 Q. And that's what he put in the initial disclosures that he

13 sent you to review, correct?

14 A. Correct.

15 Q. And you corrected other parts, but you didn't correct that

16 part, right?

17 A. Correct.

18 Q. And on December 1, 2014, in your e-mail to Ms. Liberman,

19 again discussing the electronic data to be collected and

20 searched, you specifically referred, in your words again, to

21 "the four computers that would have anything related to

22 21 Century Smoking," correct?

23 A. Correct.

24 Q. Again, so that's what you told her also?

25 A. Correct.

1 Q. Okay. And you never told anybody, Ms. Liberman or
2 Mr. Leavens or anybody else: "The data is not all on the
3 computers. If we want to search it all, we have to find out
4 the volume of data in the cloud accounts"?

5 A. You are asking if I specifically said that?

6 Q. Yes.

7 You never said that?

8 A. Correct.

9 Q. Because what was going on in this time frame was in
10 interviewing the e-discovery consultants and assessing what it
11 was going to cost, one of the things that was going on was
12 assessing the volume of the data, correct?

13 A. Correct.

14 Q. That's why you provided that breakdown on December 1,
15 2014, of the various gigabytes of electronic data in each of
16 the categories on the computers that you provided to
17 Ms. Liberman?

18 A. Yes.

19 Q. Okay. And you knew that was what was going to be loaded
20 and searched?

21 A. Yes.

22 Q. Okay. And you didn't tell anyone then that the data was
23 incomplete and would not have all your e-mails?

24 A. Correct.

25 Q. Okay. So let me jump ahead for a minute on that.

1 You recall last week being asked a lot of questions
2 about this period from March to May of 2018 during which a
3 determination was reached that the full extent of your Yahoo!
4 e-mails had not been searched under the Plaintiff's search
5 terms?

6 A. Correct.

7 Q. And do you recall testifying that it took the defense team
8 a few weeks to figure out that the full Yahoo! account had not
9 been subjected to the search terms?

10 A. Yes, it was a number of weeks.

11 Q. What you said was it was actually a few weeks after
12 March 18th, 2018, that the lawyers figured out the actual
13 realization that the Yahoo! account had not been searched for
14 the full extent of the e-mails?

15 A. Correct.

16 Q. Okay. And you understand that up until that time, your
17 lawyers thought they had collected all of your e-mails from
18 the four computers that had been identified as having
19 everything related to 21 Century Smoking?

20 A. Yes.

21 MR. DAVIS: Objection, foundation.

22 THE COURT: I will sustain.

23 If you ask it "Did you understand," and then follow
24 up that question with "How did you understand it," I will let
25 you do that.

1 BY MR. SMITH:

2 Q. Did you understand that up until that time your lawyers
3 thought they had collected all of your e-mails from the four
4 computers that had been identified as having everything
5 related to the 21 Century Smoking business?

6 A. Yes.

7 Q. And how did you understand that?

8 A. Because clearly it was just getting figured out right
9 then.

10 Q. You discussed those issues with your lawyers, also,
11 correct?

12 A. At that point is when they seemed to have figured it out,
13 so that's clearly -- and then they searched my e-mails, so
14 that's how I knew.

15 Q. And you were aware that the information from the hard
16 drives of those computers had, in fact, been searched by
17 4Discovery against the Plaintiff's search terms, correct?

18 A. Yes.

19 Q. And that search for e-mails including the designated
20 search terms, that turned up hundreds of e-mails, right?

21 A. Yes.

22 Q. And this nearly 50,000-page production?

23 A. Yes.

24 Q. And you knew, by the way, that that production was
25 significantly larger than DR's production, correct?

1 A. Correct.

2 Q. The small company produced almost ten times the records
3 that the large company produced?

4 A. Yes.

5 Q. And the reason for that was it was always your
6 understanding that the guiding philosophy of the defense team,
7 meaning you and your lawyers, was to overproduce and make sure
8 you gave up everything that possibly could bear on this case?

9 A. Correct.

10 Q. And that was always what everybody wanted to do as far as
11 you knew?

12 A. Yes.

13 Q. Okay. But to get to the bottom line of this series of
14 questions, based on your own participation in that process, in
15 the spring of 2018, the fact that your production was
16 incomplete because it did not include all of the Yahoo!
17 e-mails that were on the online account was not figured out
18 until, approximately, May, correct?

19 A. Correct.

20 Q. Okay. That's what you gleaned from being in the middle of
21 that process with your lawyers?

22 A. Yes.

23 Q. Okay. Now, let's turn for a second to the auto-delete
24 issue.

25 And to be clear, this auto-delete issue was only

1 applicable to at least some -- maybe all, but some -- of the
2 GoDaddy-based accounts, correct?

3 A. Correct.

4 Q. That would be the @21centurysmoking.com accounts?

5 A. Yes.

6 Q. And to be clear, you didn't even know that this
7 auto-delete function existed, I believe you testified, until
8 late June of 2015?

9 A. Correct.

10 Q. You weren't aware it was happening?

11 A. Correct.

12 Q. It wasn't a setting that you asked for?

13 A. Correct.

14 Q. And it wasn't anything you intended to be in place?

15 A. Correct.

16 Q. And because you didn't know about it, you obviously
17 couldn't tell anybody about it before you discovered it in
18 late June of 2015?

19 A. Correct.

20 Q. Now, is it also true that after you discovered the
21 auto-delete setting, you also told your lawyers that e-mails
22 from the 21centurysmoking.com accounts were also
23 auto-forwarded to your Yahoo! e-mail account?

24 A. The bduke@21centurysmoking account, yes.

25 Q. And, in fact, you told them that "from" e-mails from that

1 account went to the Yahoo! account, correct?

2 A. No, just inbox e-mails.

3 MR. SMITH: Could we have Exhibit 17, Leavens Strand
4 Exhibit 17?

5 BY MR. SMITH:

6 Q. Now, if you will take a look at this, this is an e-mail
7 chain between you and Peter Stamatis, correct?

8 A. Correct.

9 Q. And it copies Tom Leavens and Steve Shonder, correct?

10 A. Correct.

11 Q. And let's scroll down a little bit and look at the message
12 that Mr. Stamatis sent you:

13 "You had previously advised us that e-mails from
14 bduke@21centurysmoking.com and support@21centurysmoking.com
15 were auto-forwarded to your bduke@yahoo.com account at all
16 relevant times. In examining the bduke@yahoo.com account, we
17 do not see those coming in. Can you direct us to them?"

18 Did I read that correctly?

19 A. Yes.

20 Q. And if we scroll up to your response, you say: "Only
21 bduke e-mails forward, not support e-mails."

22 Which is what you just told me a minute ago, right?

23 A. Correct.

24 Q. And you say: "I don't know what you mean by 'direct.' It
25 is every e-mail."

1 Right?

2 A. Right.

3 Q. But you didn't say: "No, it's not 'from' e-mails, it is
4 'to' e-mails"?

5 A. I mean, you are saying "from."

6 Like if you can scroll down, can I see that again?

7 "You advised us that e-mails from," as in from, not
8 sent. It doesn't say: "From the sent box of." It says
9 "from." So from those two accounts, not from the sent box of
10 those two accounts. So I don't mean "from" as in sent. I
11 mean "from" as in actually from. They exist there.

12 Q. Okay. So the fact that you had previously told them that
13 e-mails from that account, you didn't mean "from" as in sent?

14 A. "From" as in from the account forwards to this account.

15 THE COURT: "From" as in located, not "from" as in
16 sent.

17 THE WITNESS: Correct.

18 BY MR. SMITH:

19 Q. But you, as you sit here today, don't know what the
20 lawyers understood that "from" to mean, correct?

21 A. I can't understand what someone else thinks.

22 Q. Okay. So what you are telling us and what you are
23 clarifying now is that it is the "to" e-mails, not the "from"
24 or sent e-mails?

25 A. The e-mails received in bduke@21centurysmoking.com,

1 correct.

2 Q. Okay. Now, you also testified last week in connection
3 with your discovery of the auto-delete issue on June 29th,
4 2015, about what you did in the wake of that, right?

5 A. Correct.

6 Q. Okay. And you referred to an e-mail exchange you had with
7 Travis Life that day, right?

8 A. Yes.

9 Q. Okay. And you admitted on Monday, and I wrote down your
10 words, that you were "piecing this together."

11 Do you remember saying that?

12 A. I believe that's a fair statement. I don't remember
13 saying that, but that sounds right.

14 Q. Let's look at Page 165 of last Monday's transcript.

15 Do you see Line 10, Mr. Duke?

16 A. Yes.

17 Q. You are referring to "piecing things together" from
18 looking at e-mails, correct?

19 A. Correct.

20 Q. Okay. And, in fact, you actually said it twice. You said
21 at another time that you were piecing it together from the
22 communications you were looking at, fair enough?

23 A. I'm trying to get the context of this statement.

24 MR. SMITH: Go down a little further, please.

25 It doesn't matter. I will withdraw the question.

1 BY MR. SMITH:

2 Q. Let me ask it this way: What you were doing was trying to
3 reconstruct a recollection based on looking at these e-mails,
4 correct?

5 A. Correct.

6 Q. Okay. And that's because, as a matter of fact, you really
7 don't have a good recollection of what took place that day,
8 right?

9 A. Fair statement, yes.

10 Q. Okay. And to be clear, when you did your own declaration
11 about this issue in March of 2018, you didn't get the date of
12 your discovery of this issue right?

13 A. Correct.

14 Q. Okay. You didn't have the benefit of looking at these
15 documents or having called and checked in with the GoDaddy
16 people, and at that time, you said 2014, right, in your
17 declaration?

18 A. Correct.

19 Q. Okay. And now you have settled on June 29th, 2015, right?

20 A. For sure, that's the date, yes.

21 Q. All right. And as Mr. Davis pointed out last week, you
22 also at one point approximated that date as May of 2015?

23 A. Correct.

24 Q. And I'm with you on this, I think June 29th is
25 approximately May, but the fact of the matter was you didn't

1 have a crystal clear recollection until you pieced this
2 together, correct?

3 A. Until I called and asked.

4 Q. All right. Now, you referred to -- well, you also told
5 Mr. Davis last Wednesday that you actually don't recall which
6 attorney you first told about the auto-purge issue, correct?

7 A. Correct.

8 Q. Still correct today?

9 A. Correct.

10 Q. Okay. And the e-mail exchange you had with Mr. Life that
11 day, Defendant's Exhibit 23, that doesn't say anything about
12 the auto-delete issue, does it?

13 A. No.

14 Q. It's all about issues arising from the Edmiston
15 deposition, right?

16 A. I believe so, yes.

17 Q. And, in fact, Exhibit 23 is actually incomplete. You had
18 a more extensive exchange with Mr. Life that day; do you
19 recall that?

20 A. I believe that's true.

21 MR. SMITH: Can we put up Leavens Strand Exhibit 16,
22 please?

23 And we can just scroll through these slowly, if we
24 could.

25

1 BY MR. SMITH:

2 Q. But this is actually, I believe, five or six distinct
3 exchanges you had with Mr. Life in the wake of the Edmiston
4 deposition that day.

5 Just let us know if we are moving too fast, Mr. Duke.

6 A. Okay.

7 Q. You agree this is all pretty much about the Edmiston
8 deposition and the question of whether he had an equity
9 interest in your company?

10 A. Yes.

11 Q. Not a word in here about the auto-delete?

12 A. No.

13 Q. Okay. And the fact of the matter is you don't really
14 remember the specifics of any conversations about the
15 auto-delete with Mr. Life, do you?

16 A. I remember discussing it with someone. I told you I do
17 not remember -- I don't remember who I discussed it with. I
18 remember discussing it with someone.

19 Q. That's the point. You are not even sure you spoke to
20 Mr. Life about it, right?

21 A. I'm not sure who I talked to.

22 Q. All right. And you are not sure when you first reported
23 it to anybody, correct?

24 A. As soon as I got off the phone with GoDaddy, I called an
25 attorney.

1 Q. You called somebody, but you can't say who or what was
2 said or how they reacted?

3 A. No.

4 Q. Okay. And until you did this reconstruction, piecing it
5 together -- by the way -- strike that question, please.

6 By the way, you actually testified last week that you
7 weren't sure whether you made the call before or after you
8 talked to GoDaddy, didn't you?

9 A. Which call?

10 Q. This supposed call to a Leavens Strand lawyer or one of
11 your defense team about this.

12 A. Correct, yes, I may have called right before or right
13 after, but GoDaddy was the confirmation of the issue that I
14 was seeing.

15 Q. So you don't recall if it was before or after, right?

16 A. It would have been right before or right after, correct.

17 Q. You don't recall who you talked to?

18 A. Correct.

19 Q. Don't recall what was said?

20 A. Correct.

21 Q. Okay. Now, let's turn to a related issue that I think we
22 can agree on.

23 You were asked by Mr. Davis last Monday why
24 Mr. Life's May 14, 2018, declaration, Defendant's Exhibit 5,
25 didn't disclose the auto-delete issue.

1 Do you remember being asked that?

2 A. Yes. I do remember being asked it, yes.

3 Q. And you said you didn't know. You weren't involved in the
4 preparation of Mr. Life's declaration, right?

5 A. Correct.

6 Q. But what you do know is that the auto-delete issue had
7 already been disclosed by you two months earlier in your
8 declaration, right?

9 A. I would have to see it. I believe -- there is no reason
10 for me not to believe that.

11 MR. SMITH: I just want to put this issue to rest.

12 Let's put Defendant's Exhibit 5 up first.

13 BY MR. SMITH:

14 Q. This is Mr. Life's declaration, right?

15 A. Okay.

16 MR. SMITH: And let's go to the end of it, just to
17 see what it is dated.

18 BY MR. SMITH:

19 Q. It's dated May 14, 2018, right?

20 A. Correct.

21 MR. SMITH: Now, let's put Leavens Strand Exhibit 9
22 up, please, and let's go to the end of that.

23 Whoops, it is an attachment.

24 BY MR. SMITH:

25 Q. That's your declaration on March 19, 2018, correct?

1 A. Correct.

2 Q. About two months earlier?

3 A. Yes.

4 Q. And this was all about the auto-delete issue, right?

5 A. Can I see that real quick?

6 MR. SMITH: Scroll up.

7 THE WITNESS: Correct.

8 BY MR. SMITH:

9 Q. Okay. And it was filed as an attachment to Docket
10 No. 234, "Defendant's Supplemental Local Rule 56.1(a)(3)
11 Statement of Material Facts." You are probably not --

12 A. I will take your word for that.

13 Q. Okay. Fair enough.

14 You may not know what it was attached to, but you
15 understand that you had created this declaration in March to
16 be filed with the court, right?

17 A. Correct.

18 Q. And that was way back before Mr. Life's declaration?

19 A. Correct.

20 Q. Okay. And let's turn to another subject, and that's the
21 Edmiston recordings.

22 You recall we spent a lot of time on that last week?

23 A. Yes, we did.

24 Q. And your testimony, as I understand it, is that you always
25 understood that Mr. Edmiston had made or attempted to make two

1 audio recordings at the trade show he attended?

2 A. Correct.

3 Q. And you also understand that Mr. Edmiston testified in his
4 deposition that he attempted to make two recordings, correct?

5 A. Correct.

6 Q. So there was no secret about that?

7 A. Correct.

8 Q. And, by the way, you have read Mr. Edmiston's deposition,
9 correct?

10 A. I believe so, yes.

11 Q. You read it, if not for your own staying apprised of the
12 case, you also read it for purposes of making confidential
13 information designations.

14 Do you recall that?

15 A. Yes.

16 Q. Okay. But anyway, there was no secret about the fact that
17 he tried to make two recordings?

18 A. Correct.

19 Q. And he also clearly testified in his deposition that the
20 second recording did not work and there was no recording to
21 send.

22 Do you remember that?

23 A. Correct, yes.

24 Q. So that was in June of 2015, right?

25 A. I believe you. I don't know the date.

1 Q. Something like seven months after you had e-mail exchanges
2 with Mr. Edmiston about what he had done and you had e-mail
3 exchanges with the Leavens Strand lawyers about the
4 recordings?

5 A. That sounds accurate, yes.

6 Q. You had e-mail exchanges with the Leavens Strand lawyers
7 from about September 30th -- well, you had a number of
8 exchanges on September 30th, correct?

9 A. Correct.

10 Q. And I'm going to get to it in a minute, but we know you
11 had some e-mail exchanges with Mr. Edmiston on October 2 and
12 October 4, correct?

13 A. That sounds right.

14 Q. But seven months later, Mr. Edmiston testified the second
15 recording did not work and there was no recording to send,
16 right?

17 A. Correct.

18 MR. SMITH: Let's put up Exhibit 20.

19 Keep going.

20 Stop there.

21 BY MR. SMITH:

22 Q. And he's being asked about a second recording, and he
23 said:

24 "I stopped and tried to record again, and it wouldn't
25 work."

1 Right?

2 A. Correct.

3 Q. That's what you read when you read his deposition?

4 A. Yes.

5 Q. Okay. Now --

6 THE COURT: When did you read his deposition?

7 MR. SMITH: Pardon me?

8 THE COURT: When did you read his deposition?

9 THE WITNESS: I do not recall.

10 THE COURT: Can you give me a year?

11 THE WITNESS: After it was done because part of it --

12 THE COURT: I figured that one out myself.

13 THE WITNESS: Part of it was that he had thought he
14 had equity ownership. So I was curious where exactly that
15 came from. And I guess he is saying something about
16 confidentiality. I don't know -- I don't recall that. I know
17 that -- I remember looking at it, and out of curiosity, why he
18 would have said what he said about the equity part of it.

19 THE COURT: Okay.

20 MR. SMITH: Let's scroll down a little further, if we
21 can.

22 BY MR. SMITH:

23 Q. And at Lines 12 and 13, he says -- he is being asked about
24 both of the recordings on Line 5, and then he says:

25 "No, I think it was just the first one because the

1 second one, there wasn't anything."

2 Right?

3 A. Correct.

4 Q. Now, to get to the point here, as you testified last
5 Monday, you only sent the one recording, the first recording,
6 to your lawyers at the Leavens Strand firm; is that correct?

7 A. Yes, exactly.

8 Q. I believe you testified that was your decision alone, fair
9 enough?

10 A. Absolutely, yes.

11 Q. And we also know that you received e-mails from
12 Mr. Edmiston dated October 2 and October 4, 2014, and I
13 believe those were marked as Plaintiff's Exhibit 23 and 24.

14 Do you recall that?

15 A. I don't recall exactly.

16 Q. Not the exhibit numbers. I apologize for that.

17 Do you remember having e-mail exchanges with
18 Mr. Edmiston on October 2 and October 4?

19 A. Yes, yes.

20 MR. SMITH: Let's put up Plaintiff's 24 first.

21 MS. RICH: Plaintiff's 24?

22 MR. SMITH: Yes.

23 BY MR. SMITH:

24 Q. So this is the October 4 e-mail that you were asked about
25 last week, correct?

1 A. Yes.

2 Q. Referring to the second recording, okay?

3 A. Correct.

4 MR. SMITH: And let's look at 23 for a minute.

5 My mistake. I intended to do this chronologically,

6 and I got it backwards.

7 BY MR. SMITH:

8 Q. And this is the one that says: "Video too long to send,

9 but I have it," right?

10 A. Correct.

11 Q. So both of those refer to another recording. I'm not

12 going to get into whether there is two versus three, but they

13 refer to another recording, in any event, correct?

14 A. Correct.

15 Q. Okay. And you testified that you did not send either of

16 those e-mails to your lawyers at Leavens Strand, also correct?

17 A. Correct.

18 Q. Okay. In fact, you testified that it was your decision

19 not to send those e-mails to your lawyers, correct?

20 A. Correct.

21 Q. And let's back up.

22 It's true, isn't it, that on September 30th, 2014,

23 just a few days before you got those e-mails from

24 Mr. Edmiston, you unequivocally told your lawyers at Leavens

25 Strand that there was only one recording?

1 A. Correct, yes. That was to the best of my knowledge, yes.

2 MR. SMITH: All right. Let's look for a minute at
3 Leavens Strand Exhibit 18, please.

4 BY MR. SMITH:

5 Q. And this is an e-mail chain --

6 MR. SMITH: Scroll down a little bit, if you would,
7 please.

8 BY MR. SMITH:

9 Q. -- an e-mail chain between you and Heather Liberman. And
10 ultimately, she winds up communicating with Tom Leavens,
11 right?

12 A. Correct.

13 Q. And she is asking you at 11:32 a.m.: "Find out whether
14 there is a second recording."

15 No. 1, right?

16 A. Uh-huh.

17 Q. No. 2: "Whether Bill" -- Bill Edmiston -- "still has the
18 recording."

19 Right?

20 A. Yes.

21 Q. No. 3: "If Bill has the recording, ask him to send it to
22 you."

23 Right?

24 A. Correct.

25 MR. SMITH: Now, if we scroll down a little bit -- or

1 scroll up a little bit to the next message -- oops, I missed
2 one.

3 Scroll back down.

4 BY MR. SMITH:

5 Q. I'm looking at yours, your September 30th at 2:37 p.m.

6 You say to Heather Liberman: "Said recording did not
7 work, so there isn't another recording"?

8 A. Correct.

9 Q. Okay. And then if we go to the top e-mail in the chain,
10 she advises Mr. Leavens one minute later at 2:38 p.m.: "See
11 Brent's response below. There is no second recording."

12 Right?

13 A. Correct.

14 Q. Okay. And that's what you said in your written
15 communication, "There is no second recording," right?

16 A. Correct.

17 Q. And as I understand your testimony last week, you say that
18 sometime later, after receiving Mr. Edmiston's October 4
19 e-mail, you orally told your counsel there was a second
20 recording; is that your testimony?

21 A. I remember orally saying it when I first found out about
22 the whole situation. I don't remember orally saying it weeks
23 later. I'm getting confused as to the time frame right now.

24 Q. Regardless of when you made this oral communication, you
25 did testify last week that you didn't recall which of your

1 attorneys you told, right?

2 A. Correct.

3 Q. And what we know is you didn't send another e-mail to
4 Leavens Strand on this issue like you had done multiple times
5 in this chain before, right?

6 A. Correct.

7 Q. And you didn't forward Mr. Edmiston's e-mails, right?

8 A. Correct.

9 Q. And you also know that some months later, Bill Edmiston
10 gave his deposition in late June of 2015 and unequivocally
11 testified there wasn't a second recording, right?

12 A. Correct.

13 Q. And you reviewed Mr. Edmiston's deposition, as we said?

14 A. Correct.

15 Q. And in August of 2015 -- I think it's a late June
16 deposition, so this is about a month later, after the
17 transcript is available -- Mr. Life asked you to review the
18 Edmiston deposition for designations of sensitive corporate
19 information.

20 Do you recall that?

21 A. I didn't recall the time, but, yes, that sounds right.

22 MR. SMITH: Could we put up Leavens Strand
23 Exhibit 20?

24 Hang on.

25 I apologize, your Honor.

1 THE COURT: That's okay.

2 MR. SMITH: My outline has an incorrect number in it.
3 It's 19.

4 BY MR. SMITH:

5 Q. Now, this is an e-mail exchange between you and Travis
6 Life on August 7th, 2015, correct?

7 A. Correct.

8 Q. And the re line is "Designations for Edmiston's
9 deposition," right?

10 A. Correct.

11 Q. And you understand that that was the confidential
12 corporate information designations or sensitive corporate
13 information designations?

14 A. Correct.

15 Q. And you had read the deposition and you suggested some
16 errors Mr. Edmiston made or statements that you didn't think
17 were entirely accurate, correct?

18 A. It appears so.

19 Q. You didn't flag, "Oh, he said there wasn't a second
20 recording," and we all know there is a second recording,
21 right?

22 A. Correct, yes. At this time, I believed there not to be a
23 second recording, correct.

24 Q. So in August of 2015, you believed there was not a second
25 recording?

1 A. Correct.

2 Q. Even though you say that back in October of 2014, you
3 advised your counsel that there was a second recording?

4 A. And then was told by Bill Edmiston there was no second
5 recording, correct.

6 Q. So you had changed your position from what you claim you
7 told your counsel. You changed your position.

8 You first told counsel on September 30th, 2014, there
9 is no second recording. Then you say in your testimony last
10 week that "I told them sometime around October 4 that there
11 was a second recording." And now eight months later, you are
12 back to no second recording, and you are not correcting this
13 erroneous deposition testimony?

14 A. This time frame is where I'm getting confused. I talked
15 to Bill Edmiston. He said there was two recordings. I told
16 my lawyers there was two recordings. He then told me there is
17 only one recording. I told my lawyers there is only one
18 recording. So in that order is how it happened. I don't know
19 about these dates that are being brought up, but I was told
20 that there was two recordings. Then I was told there was one
21 recording. So I believed there to be one recording. Until
22 very recently, I believed there was one recording.

23 Q. I don't mean to be cute, but your final answer is that you
24 believed, until very recently, there to be only one recording,
25 and you believe that your lawyers appropriately understood

1 there was only one recording?

2 A. Correct, yes.

3 Q. Okay. So you are not here suggesting that you flagged a
4 second recording for your lawyers and that they should have
5 produced that. You are not saying that at all?

6 A. No.

7 Q. Okay. You are saying your lawyers legitimately believed
8 there was only one recording and there would only be one
9 recording to produce?

10 A. Correct.

11 Q. Okay. Now, I want to go a little farther forward to the
12 meeting in San Diego that you had at least face-to-face with
13 Mr. Leavens, correct?

14 A. Yes.

15 Q. Now, you placed that meeting, and I think you approximated
16 it, but you placed that meeting as being in, approximately,
17 November, correct?

18 A. I don't -- yes, sometime in 2018.

19 Q. You wouldn't be surprised to find out it was actually in
20 September?

21 A. Not at all.

22 Q. Okay. And you said Mr. Stamatis was on the phone,
23 correct?

24 A. Correct.

25 Q. And he wasn't the only lawyer that was attending that

1 meeting by phone, was he?

2 A. I don't recall everyone who was on the call.

3 Q. Well, you know that Mr. Salam was on the phone for that
4 meeting.

5 You recall that, don't you?

6 A. I do not recall. I know he may have been on the meeting
7 for part of the meeting, but I don't recall him being on for
8 the entirety of the meeting.

9 Q. Well, that meeting, Mr. Salam was on the phone because he
10 sort of functioned as your separate personal counsel in that
11 time frame, right?

12 A. Correct.

13 Q. He had handled some of the insurance dispute for you,
14 correct?

15 A. Yes.

16 Q. And you had continued to use him as sort of like an extra
17 sounding board, right?

18 A. Correct.

19 Q. And that's why he was at that meeting by telephone,
20 correct?

21 A. If you are saying he was at the meeting, then, yes, that
22 would have been why he would have been there.

23 Q. I guess you are telling me you don't recall that?

24 A. I do not recall him specifically being on that call, no.

25 Q. You recall Mr. Shonder was also on the phone?

1 A. I do not.

2 Q. But you did know that this was effectively an
3 all-hands-on-deck meeting, didn't you?

4 A. Yes.

5 Q. Okay. So there was no question in your mind about the
6 seriousness of this meeting, right?

7 A. No.

8 Q. Because it was in the wake of the Plaintiffs laying out
9 their plan for a sanctions motion, right?

10 A. Correct.

11 Q. And, in fact, you testified last week that the concept of
12 sanctions was discussed at this meeting, correct?

13 A. Correct.

14 Q. Okay. So you knew the meeting was being held because of
15 the threat of sanctions, right?

16 A. Correct.

17 Q. Okay. And the discussion wasn't just about e-mails, was
18 it?

19 A. As I said, I do not recall a lot of the details of the
20 meeting.

21 Q. You don't remember there being discussion of your
22 deposition testimony?

23 A. I do not recall the subject that we talked about in the
24 meeting.

25 Q. Well, did your lawyers at that meeting discuss with you

1 the fact that they were concerned that events in the case had
2 potentially affected your credibility?

3 MR. LEONARD: Objection, attorney-client privilege.

4 MR. SMITH: Well, we will excuse Mr. Salam from that,
5 although I'm not sure I have to.

6 BY MR. SMITH:

7 Q. But I will say did your Leavens Strand lawyers or
8 Mr. Stamatis or Mr. Shonder suggest to you that there were
9 issues about your credibility?

10 MR. LEONARD: Same objection, attorney-client
11 privilege.

12 THE COURT: Overruled.

13 THE WITNESS: I do not recall that, no.

14 BY MR. SMITH:

15 Q. You don't recall that they wanted to make sure you
16 understood that there was the potential for sanctions arising
17 from deposition testimony?

18 MR. LEONARD: Same objection, your Honor.

19 Can I just have a continuing objection?

20 MR. SMITH: And to be clear --

21 THE COURT: Let him finish the objection.

22 We've played this game a couple of times, right?

23 Again, question, objection. Let the question finish,
24 let the objection finish, don't answer, I will rule.

25 Go ahead.

1 MR. LEONARD: Judge, just to be a non-obstructionist,
2 can I have a continuing objection to all parts of this
3 conversation on attorney-client privilege, or would you like
4 me to make an individual objection to each question?

5 THE COURT: Do whatever you think you need to do to
6 preserve your record.

7 MR. LEONARD: Okay. Objection, attorney-client
8 privilege.

9 THE COURT: All right. Overruled.

10 MR. SMITH: And I apologize for the interruption. I
11 think that's my first black mark, your Honor, but I will
12 probably get more, so I apologize.

13 THE COURT: That's okay.

14 BY MR. SMITH:

15 Q. And, again, from these questions, I'm going to exclude
16 Mr. Salam for purposes of convenience.

17 But my question is: Did the other lawyers at the
18 meeting suggest to you that there were issues raised about
19 your credibility as a result of deposition testimony?

20 MR. LEONARD: Objection, attorney-client.

21 THE COURT: Overruled.

22 And the question as to Mr. Duke's credibility and
23 statements under oath are fully encompassed in the motion for
24 sanctions, and it was all agreed that the attorney-client
25 privilege was not going to be asserted on issues encompassed

1 in the motion.

2 So overruled.

3 Go ahead and answer.

4 THE WITNESS: As I said previously, I really do not
5 recall a lot of details from that meeting.

6 BY MR. SMITH:

7 Q. Did you feel put on the spot at all at that meeting?

8 A. No.

9 Q. Okay. But you knew at least that the lawyers were very
10 concerned about where the case went from there, fair enough?

11 MR. LEONARD: Objection to foundation and
12 attorney-client privilege.

13 THE COURT: What was your understanding?

14 THE WITNESS: I did not --

15 THE COURT: Sustained.

16 What was your understanding?

17 THE WITNESS: I did not have an understanding that
18 they were concerned about the case, no.

19 BY MR. SMITH:

20 Q. So you thought this was just another strategy meeting?

21 A. I thought that this was discussing the fact that the
22 Yahoo! e-mails, there was a mess up in discovery, but it was
23 something that we would be able to get over, essentially, and
24 given the strength of our case, that it was something that
25 wasn't good, but wasn't whatever word you just used. I did

1 not feel that way, no.

2 Q. Let me ask you about one more subject.

3 THE COURT: Is this a different subject matter or
4 subject about this meeting?

5 MR. SMITH: It is a different subject matter.

6 Do you want a break, your Honor?

7 THE COURT: Hold on one second.

8 We have said that -- let me just interrupt for a
9 second.

10 You said the meeting, you were in San Diego, and
11 Mr. Leavens was in San Diego, correct?

12 THE WITNESS: Correct.

13 THE COURT: Where in the city of San Diego did this
14 meeting occur?

15 THE WITNESS: I want to say at like the Sheraton by
16 the airport.

17 THE COURT: Okay. You did tell us about that before.
18 And how was this meeting set up? How was it
19 arranged?

20 THE WITNESS: We sat in a conference room, just he
21 and I in a conference room.

22 THE COURT: I assume there were e-mails or
23 conversations saying: "Meet at the Sheraton"?

24 THE WITNESS: Yes.

25 THE COURT: People -- you don't remember who, but you

1 think somebody called in, right?

2 THE WITNESS: There were definitely lawyers on the
3 phone.

4 THE COURT: So were there e-mail exchanges or
5 telephone calls about a conference call number to call in, how
6 people were going to participate in this meeting?

7 THE WITNESS: I wouldn't have been involved in that
8 type of thing. I had an e-mail from Mr. Leavens telling me
9 what time to meet him.

10 THE COURT: Okay. So that was it, just an e-mail
11 from Mr. Leavens saying show up at the Sheraton this date, at
12 this time?

13 THE WITNESS: And I believe he gave me documents to
14 review and said: "Meet at this time."

15 THE COURT: Okay. Did he say what the purpose and
16 nature of that meeting was going to be when he gave you those
17 documents and told you the date and time to appear?

18 THE WITNESS: I can't recall if he told me before or
19 after, but to the best of my knowledge and recollection of
20 that meeting, it was him basically offering to step aside from
21 the case, and that's what really struck home with me from that
22 meeting.

23 THE COURT: Did he say he was out there solely for
24 the purpose of this meeting, or was he going to Sea World, or
25 what?

1 THE WITNESS: It was only for that meeting is what I
2 understood, and that's why he wanted to meet at the airport,
3 because he was just coming in, and he was going somewhere else
4 afterward.

5 THE COURT: Had you ever met with Mr. Leavens in
6 San Diego previously?

7 THE WITNESS: No.

8 THE COURT: Have you ever met with Mr. Leavens in
9 San Diego since this meeting?

10 THE WITNESS: No.

11 THE COURT: Okay. All right. Go ahead.

12 MR. SMITH: All right. Thank you, your Honor.

13 BY MR. SMITH:

14 Q. I want to understand a couple of things about the
15 discoveries that the e-mails were not entirely --

16 THE COURT: I'm sorry. How much time on this subject
17 matter? Because we have got a couple criminal matters for
18 status.

19 MR. SMITH: I really don't know, your Honor. It
20 might be brief.

21 THE COURT: Okay. Then let's see where -- go ahead,
22 go ahead.

23 MR. SMITH: Maybe I can cover these, and if we break,
24 I may have something more. I may not.

25 THE COURT: And that's fine. You know, I don't want

1 to have sort of an awkward break in the middle. So I just
2 wanted to give you a heads up.

3 So, go ahead. Do what you need to do.

4 MR. SMITH: And I just interrupted you about three
5 times in that exchange.

6 THE COURT: Go ahead.

7 MR. SMITH: I apologize.

8 Yes, I can probably do what I need to do in about
9 five minutes here.

10 THE COURT: Okay.

11 BY MR. SMITH:

12 Q. Last week, you were asked about your May 29, 2019, meeting
13 with Mr. Stamatis and Mr. Shonder.

14 Do you recall that?

15 A. Yes.

16 Q. And that's the meeting at which you told them that you had
17 a realization that the @21centurysmoking.com GoDaddy e-mail
18 accounts had likely not been fully searched?

19 A. I had a realization that the other, like -- so the Rob,
20 the Robert, all those additional accounts had not been
21 searched, correct.

22 Q. Well, you seem to be saying two things. You seem to be
23 saying there were other e-mail accounts that had, perhaps, not
24 been searched?

25 A. Correct. That is what I was first asking them about,

1 correct.

2 Q. But you seem to also be saying that you had determined
3 that there was potentially additional data on the cloud that
4 hadn't been on the hard drives, right?

5 A. Could you repeat that real quick?

6 Q. Yes.

7 I'm asking now about the support@21centurysmoking.com
8 and bduke@21centurysmoking.com.

9 A. Yes.

10 Q. You also felt they had, perhaps, not been fully searched?

11 A. I thought that they had not been given the same scrutiny
12 as the Yahoo! e-mails, correct.

13 Q. And had you had that understanding for a while before that
14 meeting?

15 A. Whenever I sent over the e-mail accounts to the lawyers,
16 so that would have been like a year before that, when I sent
17 over the passwords for the support and the bduke is when I
18 would have known that, yeah, they weren't searched in the same
19 way that the yahoo.com was.

20 Q. But what I'm asking you now specifically is about the
21 @21centurysmoking.com GoDaddy-based accounts.

22 When did you come to the realization that -- or when
23 did you tell the lawyers for the first time, "Hey, these
24 haven't been searched"; at that May 29th meeting?

25 A. No, when I sent over the e-mail saying, "Hey, you guys, we

1 probably should search these as well," which was in May of
2 2018, I believe, or something like that.

3 Q. Of course the e-mail doesn't say that, your e-mail sending
4 over those passwords, right?

5 You sent over your passwords, you sent over your
6 credentials, correct?

7 A. Titled something like "Just to be safe," correct.

8 Q. And the focus at that time was on the Yahoo! account,
9 correct?

10 A. Yes, correct.

11 Q. Okay. So are you saying that when you had this
12 conversation at the May 29th meeting that you had known for
13 some time and not had a further conversation with the lawyers,
14 or what are you saying about that meeting?

15 A. I'm saying that I just, at that meeting, realized that
16 these other 21centurysmoking.com accounts had never been
17 searched, and I didn't know if that mattered, and then I also
18 questioned them as to whether the bduke and the support needed
19 to be searched in a more substantial way, in the way that the
20 Yahoo! e-mail was.

21 Q. So you are saying you really had -- there really was a
22 eureka moment, a sudden realization at the meeting that caused
23 you to further raise that?

24 A. Correct, yes.

25 Q. Okay. It wasn't something you had been sitting on?

1 A. No.

2 Q. Okay. And, of course, you described last week the
3 reaction that Mr. Stamatis and Mr. Shonder had, correct?

4 A. Yes.

5 Q. And you referred -- I think you used the words both
6 "shock" and "surprise," correct?

7 A. Fair to say, yes.

8 Q. It was clear that they were not aware that that was the
9 case?

10 A. Correct.

11 Q. And it was also clear to you that there was never any
12 intention that that would be the case?

13 A. Correct.

14 Q. So with that, let me back up for a minute and just ask a
15 question about this May of 2018 realization that the full
16 extent of the Yahoo! account had not been searched.

17 Are you with me?

18 A. Yes, yes.

19 Q. Is it fair to say that you also weren't fully aware of
20 that until May of 2018?

21 A. Correct.

22 Q. So that was when you fully realized that also, correct?

23 A. Yes.

24 Q. You had not intended for that to be the case?

25 A. Correct.

1 Q. You had not intended for your lawyers to be involved in
2 that being the case, correct?

3 A. Correct.

4 Q. You had up until that point operated in good faith under
5 the belief that there had been a complete search?

6 A. Correct.

7 Q. Based on what had already been done, correct?

8 A. Exactly.

9 MR. SMITH: Okay. Your Honor, this would be a good
10 place for me to break and determine whether I have got any
11 more that I need to do.

12 THE COURT: Okay. All right. Let's take a break.

13 (Recess taken.)

14 THE CLERK: Recalling 12 CV 50324, DR Distributors,
15 LLC v. 21 Century Smoking, Inc.

16 THE COURT: We will show the same appearances.

17 Mr. Smith, what's your estimate?

18 MR. SMITH: Pardon me?

19 THE COURT: What's your estimate? What do you think?

20 MR. SMITH: Even better than that, Judge, I have no
21 further questions at this time.

22 THE COURT: Okay. Who would be doing the next exam?

23 Mr. Holevas, you are standing up. Would you be going
24 next?

25 MR. HOLEVAS: Yes.

1 THE COURT: Okay. We will take a quick break. You
2 get ready. We will get Mr. Duke up. And we will start up
3 again, okay?

4 (Recess taken.)

5 THE COURT: All right. Mr. Duke, remember, you are
6 still under oath.

7 THE WITNESS: Yes, your Honor.

8 THE COURT: Go ahead, Mr. Holevas.

9 MR. HOLEVAS: Thank you, your Honor.

10 CROSS-EXAMINATION

11 BY MR. HOLEVAS:

12 Q. Mr. Duke, I don't believe we have ever had the pleasure of
13 being introduced. My name is John Holevas, and I represent
14 Mr. Stamatis in this case.

15 I'm going to ask you some questions regarding some
16 things that I hope will be helpful to Judge Johnston as he
17 reviews this motion, and those will kind of center on who knew
18 what, when, and what did they do with that information, okay?

19 A. Okay.

20 Q. In your prior testimony last week and today, there has
21 been some discussion about what your former lawyers told you
22 or what you told your former lawyers.

23 I want to unpack that a little bit because
24 notwithstanding the fact that your former lawyers all withdrew
25 on the same day, they came into this case at different times,

1 correct?

2 A. Correct.

3 Q. Okay. So what I might try to refer to, and with your
4 permission, your first group of lawyers, Mr. Leavens and
5 Mr. Life, Ms. Liberman, I may refer to them as "group number
6 one" or "Mr. Leavens and his team."

7 Is that okay?

8 A. Yes.

9 Q. And then later on, Mr. Stamatis and Mr. Shonder came into
10 this case, correct?

11 A. Correct.

12 Q. I may refer to them as "Mr. Stamatis," "Mr. Shonder," or
13 "group number two," okay?

14 A. That's fine, sir.

15 Q. All right. Now, I think it has been established that the
16 complaint in this case that the Plaintiffs filed was filed on
17 September 7th of 2012.

18 Do you recall that being the date?

19 A. It sounds right.

20 Q. Okay. And I think you said that Mr. Leavens, you
21 contacted him, and he was your first lawyer. In or around
22 September of that year, he came into this case, correct?

23 A. Correct.

24 Q. And I believe it indicates that he entered an appearance
25 on October 3rd of 2012.

1 Does that sound about right to you?

2 A. It sounds right.

3 Q. Do you know when Mr. Stamatis entered his appearance in
4 this case?

5 A. Sometime before my deposition.

6 Q. Okay. If I were to tell you, sir, that Docket No. 122,
7 that was filed on June the 8th of 2015, and that's when
8 Mr. Stamatis entered his appearance, would you have any reason
9 to disagree with that?

10 A. No.

11 Q. Okay. So that would be, approximately, almost three years
12 that this case had been pending before Mr. Stamatis entered
13 his appearance, correct?

14 A. Correct.

15 Q. And just for the record, I think Mr. Shonder maybe entered
16 his appearance at or about that same time.

17 Is that your recollection?

18 A. I do not recall.

19 Q. Okay. Fair enough.

20 And I think you told us earlier that Mr. Leavens
21 brought Mr. Stamatis into this case as trial counsel because
22 Mr. Leavens hadn't really tried a case for quite a few years.

23 Was I correct about that?

24 A. Correct.

25 Q. Okay. Now, we had a lot of discussion so far about what

1 Mr. Leavens and your group one lawyers told you about
2 preservation of documents and electronically stored
3 information, correct?

4 A. Correct.

5 Q. And I'm not going to belabor that because I think we have
6 had a lot of testimony about that, but it was clear to you, in
7 no uncertain terms, what your obligation was about maintaining
8 and preserving evidence, correct?

9 A. Correct.

10 Q. Would it be fair to say that when Mr. Stamatis and
11 Mr. Shonder came into this case three years after those
12 discussions that you had with Mr. Leavens and his firm that
13 Mr. Stamatis didn't need to read you that riot act again
14 because you knew what your obligation was, right?

15 A. Fair to say, yes.

16 Q. Mr. Shonder and Mr. Stamatis didn't have to repeat
17 everything that Mr. Leavens told you about your duties and
18 responsibilities because they were crystal clear in your mind,
19 correct, sir?

20 A. Correct.

21 Q. Some discussion about a litigation hold letter, I think
22 Mr. Davis had asked you that on your first day of testimony,
23 and Mr. Smith had reiterated it again today. I will represent
24 to you, sir, that's kind of a letter where the lawyer will
25 tell the client exactly what Mr. Leavens told you about

1 preserving documents and information.

2 Would it be fair to say that Mr. Stamatis and
3 Mr. Shonder didn't need to send you any such litigation hold
4 letter because, once again, your obligation was crystal clear
5 in your mind?

6 A. Yes.

7 Q. Okay. Now, is it my understanding, am I correct, sir,
8 that before this litigation began, either your first group of
9 lawyers, Mr. Leavens and his firm, and/or Mr. Stamatis and
10 Mr. Shonder, had never represented you before, correct?

11 A. Correct.

12 Q. They had never represented 21 Century Smoking, Inc.,
13 correct?

14 A. Correct.

15 Q. Never served as a corporate counsel for that entity,
16 correct?

17 A. Correct.

18 Q. Never served as a personal counsel for Brent Duke,
19 correct?

20 A. Correct.

21 Q. Okay. So would it be fair to say, sir, that between you,
22 on the one hand, and Mr. Leavens and his firm and Mr. Stamatis
23 and Mr. Shonder, that you would be in the best position to
24 know where your corporate records and documents germane to
25 this litigation would be maintained and housed?

1 Would that be fair?

2 A. Correct.

3 Q. Okay. And would it be fair to say that when you provided
4 them information about where documents germane to this case
5 and were relevant to this case and that should be produced in
6 this case, that you reasonably relied upon them taking what
7 you said at face value, correct?

8 A. Correct.

9 Q. Now, I believe you have testified consistently that you
10 believe that the documents that should be searched in
11 this -- or the data that was called for to be produced in this
12 case were probably housed on those four computers that you
13 have testified about?

14 A. Yes.

15 Q. Okay. And I believe Mr. Salam went through on, I think,
16 either your first or your second day of testimony a very
17 extensive laundry list of a number of electronic devices that
18 you had.

19 Do you remember that sheet that you went through with
20 Mr. Salam?

21 A. Yes.

22 Q. I think some of them you even talked about a computer that
23 may have been in your garage for 20 years, correct?

24 A. Correct.

25 Q. In your wildest dreams, did you ever think that that

1 computer needed to be searched in this case to produce
2 documents that were relevant to this case?

3 A. Of course not.

4 Q. You did your utmost and your reasonable best to identify
5 what devices needed to be searched, and you told your lawyers,
6 both your first set and your second set, what those computers
7 were, correct?

8 A. Correct.

9 Q. All right. Now, I understand, and Mr. Smith had
10 questioned you a little bit about this, that those four
11 computers were imaged by you remotely in some fashion,
12 correct?

13 A. Yes.

14 Q. Okay. And Mr. Smith had said something about whether you
15 are more attune than the average Joe about computer things.

16 Do you remember that exchange?

17 A. Correct.

18 Q. Well, I can represent to you, sir, and I think Judge
19 Johnston can take judicial notice of this, I'm less than the
20 average Joe.

21 So let me just ask you in this sense: You went
22 through those devices, and you referenced a Pinterest account.

23 Do you remember that exchange?

24 A. Yes.

25 Q. Did you ever think you needed to search your Pinterest

1 account to find documents relevant and germane to this case?

2 A. I have never even logged into it, so no.

3 Q. Okay. So notwithstanding the fact you may have a lot of
4 devices, you made the best and reasonable efforts to determine
5 where documents that should be searched and should be produced
6 in this case were located, correct?

7 A. Yes.

8 Q. All right. And that initial searching that was done, and
9 I think it has been alluded to, maybe 40,000, 50,000 documents
10 that were produced, all those searches were completed and
11 those documents turned over before Mr. Stamatis and
12 Mr. Shonder ever arrived on the scene; is that correct?

13 A. Correct.

14 Q. Now, I understand that there may be some issue pertaining
15 to whether those forensic images of your hard drives have now
16 somehow maybe been corrupted or lost or destroyed.

17 Am I correct on that?

18 A. Yes.

19 Q. Okay. But is it also true that those computers still
20 exist today?

21 A. Yes.

22 Q. And you have told us repeatedly that you have never
23 deleted anything off of those computers, correct?

24 A. Correct.

25 Q. And if I use the example that Mr. Davis used when he

1 questioned you about copying things, and I think what he said
2 is if he takes his notes, his outline, and he put it on a
3 Xerox machine and he made a copy, he would have a copy of
4 those notes, correct?

5 A. Correct.

6 Q. And if, for whatever reason, he lost the copy, as long as
7 the original notes existed, he could make another copy,
8 correct?

9 A. Correct.

10 Q. So is it fair to say, sir, that the hard drives that you
11 still have in those computers could be searched once again?

12 A. Correct.

13 Q. And all the information would still be there because you
14 haven't deleted anything, correct?

15 A. Yes.

16 Q. Okay. And I understand there is an issue about that
17 auto-delete, but, notwithstanding that fact, we could copy
18 those computers once again, correct?

19 A. Correct.

20 Q. All right. And I know you have told us, and I'm not going
21 to belabor it, that you never intentionally or willfully
22 either deleted or destroyed or withheld documents, correct?

23 A. Correct.

24 Q. I just want to ask you about that about Mr. Stamatis and
25 Mr. Shonder.

1 Did Mr. Shonder or Mr. Stamatis ever ask you or
2 direct you to delete or withhold any documents?

3 A. No.

4 Q. To your knowledge, any documents that you would have
5 provided to Mr. Shonder or Mr. Stamatis, did they ever not
6 produce those documents or told you "We are not producing
7 these"?

8 A. No.

9 Q. Now, I believe you told us about a conference that you
10 participated early on in the litigation with Mr. Leavens and
11 his team to try to identify and make that initial Rule 26
12 disclosure.

13 Do you recall that exchange?

14 A. Yes.

15 Q. That was way before Mr. Stamatis and Mr. Shonder arrived
16 on the scene, correct?

17 A. Correct.

18 Q. So whatever discussion was had about what was to be
19 produced, what was going to be searched, that was before
20 Mr. Shonder and Mr. Stamatis were involved in the case, fair?

21 A. Fair.

22 Q. Okay. And once Mr. Stamatis and Mr. Shonder came into the
23 case, you did not reasonably believe that it would be their
24 obligation to go back and voluntarily audit three years of
25 litigation that had transpired before they got in the case,

1 did you?

2 A. No, I did not.

3 Q. It would have cost a lot of time, money, and effort for
4 them to do that, and you had very capable counsel through
5 Mr. Leavens and his firm that had already done all that work,
6 correct?

7 A. Correct.

8 Q. Okay. Now, Mr. Duke, do you remember, I think it was
9 Monday, your first day of testimony, that Judge Johnston
10 alluded to a particular order in this case, and it was Docket
11 No. 116?

12 Do you remember him making reference to that?

13 A. Can you remind me what it is about?

14 Q. Okay. And I will remind you a little bit about it. And
15 to be honest with you, sir, I was not aware of this document
16 until Judge Johnston alluded to it, and I tend to take
17 particular notice when a judge takes notice of something, so I
18 did have an opportunity to read it.

19 Have you looked at it since Monday of last week?

20 A. I still don't know what it is.

21 Q. Okay. Well, let me just tell you what it is. It is an
22 order that the Judge entered in this case, and it had to do
23 with the discovery in this matter, and let me just read a
24 portion of it to you, and then I will ask you a question, and
25 it had to do with a motion for extension. The lawyers on both

1 sides wanted to have some additional time to complete some of
2 this discovery.

3 MR. von OHLEN: Can we get a docket number on that?

4 THE COURT: 116.

5 MR. HOLEVAS: Oh, I'm sorry. Yes, it is Docket
6 No. 116. It was filed on 3/4 of '15.

7 MR. DAVIS: And just to be clear, it is not the
8 minute order; it is the actual order?

9 MR. HOLEVAS: Yes, your Honor.

10 And, I'm sorry, your Honor. I don't have copies.

11 Would you like to look at it, Mr. Davis?

12 MR. DAVIS: No.

13 BY MR. HOLEVAS:

14 Q. And let me read in the pertinent parts that I believe
15 here. It says:

16 "The court will grant the motion and even give an
17 additional 30 days beyond that which is asked. However, the
18 parties are on notice that these revised dates will not be
19 moved. The parties were on notice when they first appeared
20 before the court and now they have received a warning shot.
21 Additional extensions will not be allowed. Accordingly, the
22 date for Rule 26(e) supplementations is now June 1st, 2015."

23 And I will just add that that's seven days before
24 Mr. Stamatis entered an appearance in this case.

25 It says: "Accordingly, the new date is," as I have

1 indicated, "June 1st, 2015. The close of fact discovery is
2 now July 1st, 2015."

3 Now, Mr. Duke, I will represent to you that a
4 Rule 26(e) supplementation is something that the lawyers file,
5 and kind of pardon my language here, it is kind of a
6 put-up-or-shut-up moment. You have to provide all your
7 information, supplement what your witnesses are, what your
8 documents are, and things of that nature. That order was
9 entered and that cutoff date was seven days before
10 Mr. Stamatis and Mr. Shonder became involved in this case.

11 I ask you the same question as I asked you before: I
12 take it you didn't believe that they were supposed to go back
13 and revisit and look at all the documents and within seven
14 days of their entry of appearance provide you with any counsel
15 or guidance as to what or what did not need to be additionally
16 produced; is that fair?

17 A. Fair.

18 Q. I believe you talked about early on sitting down at one
19 point with Mr. Leavens and looking through some of your
20 electronic documents or sitting side-by-side with him.

21 Do you recall that discussion?

22 A. Yes.

23 Q. At any time in this litigation, did you ever undertake
24 that type of review with Mr. Stamatis or Mr. Shonder?

25 A. Not prior to that meeting in 2019.

1 Q. Yes, exactly.

2 Okay. And we will get to that. That's the very last
3 meeting that ultimately led to the withdraw, correct?

4 A. Correct.

5 Q. I'm talking about at any time up until that point, did you
6 ever sit down with Mr. Stamatis, did you ever sit down with
7 Mr. Shonder and go through the same kind of review and
8 analysis that you did with Mr. Leavens?

9 A. No.

10 Q. Okay. But I take it you didn't believe that you needed to
11 because you had good, competent counsel representing you
12 through Mr. Leavens and his firm, correct?

13 A. Correct.

14 Q. And I believe you may have testified that at that early
15 meeting that you had when you and Mr. Leavens and his firm
16 were going through to analyze the discovery, you realized you
17 didn't have a backup system, and you put into place a
18 Carbonite system?

19 A. Yes.

20 Q. Okay. Once again, that was way before Mr. Stamatis or
21 Mr. Shonder ever got involved in this case, correct?

22 A. Correct.

23 Q. Okay. And then your first vendor that undertook the
24 searches once you had done that external download was
25 4Discovery, correct?

1 A. Correct.

2 Q. And, again, 4Discovery -- and they were provided the
3 search terms that were agreed upon by the parties?

4 A. Yes.

5 Q. Okay. Once again, 4Discovery did their work, and those
6 search terms were agreed to by the respective parties, long
7 before Mr. Stamatis or Mr. Shonder ever arrived on the scene,
8 correct?

9 A. Yes.

10 Q. And now I understand that there is a new forensic search
11 company that's undertaking I think what you have described
12 earlier as a more rigorous search of all your computer
13 information; is that correct?

14 A. Yes.

15 Q. And that's ongoing right now?

16 A. Yes.

17 Q. And that search has yet to be complete,
18 correct -- completed?

19 A. I don't know where they are at with that, no.

20 Q. Okay. Is it fair to say that right now, as we sit here
21 today, at this moment, we don't know whether there are going
22 to be any additional documents that may or may not be
23 uncovered through that search because it is not complete yet,
24 correct?

25 A. Correct.

1 Q. Okay. So whether there has been, as the Plaintiff
2 suggests in their papers and their motion for sanctions, a
3 willful refusal, an intentional refusal to produce documents,
4 we don't know if there are going to be any additional
5 documents, at least as we sit here today, correct?

6 MR. DAVIS: Objection.

7 THE COURT: Sustained.

8 BY MR. HOLEVAS:

9 Q. The discovery that was done before Mr. Stamatis and
10 Mr. Shonder came on the scene, there was about, I think,
11 maybe, was it, 50,000 or so documents that had been produced?

12 A. Correct.

13 Q. Okay. And then let's fast forward a little bit.

14 Then there became that issue that Mr. Smith had asked
15 you a bunch of questions about concerning the Yahoo! and some
16 other information that may have been in the cloud that you
17 believe, perhaps, had not been searched?

18 A. Correct.

19 Q. Okay. Those searches and those requests for you to search
20 the Yahoo! information, was that handled predominately through
21 Mr. Leavens and his firm and his team?

22 A. I don't know who handled -- I don't know what you mean by
23 that.

24 Q. Okay. So there was an issue, then, with the -- in your
25 mind whether there was an adequate search performed of the

1 Yahoo!, of the cloud accounts, correct?

2 A. I was made aware of that in that May time frame, in 2018,
3 yes.

4 Q. Okay. And then you brought that information forward to
5 your attorneys, both set one and set two, correct?

6 A. They told me. I don't remember which set told me, but I
7 was told by my attorneys.

8 Q. Okay. And then I want to get to the point where you
9 talked about a meeting that you had with Mr. Stamatis and
10 Mr. Shonder at -- I believe you couldn't recall if it was
11 Mr. Stamatis's office or Mr. Shonder's office, correct?

12 A. I don't know which of their offices it was at.

13 Q. Okay. And that's when this GoDaddy issue kind of came to
14 light, correct?

15 A. Correct.

16 Q. And that was the first time that had come to light,
17 correct?

18 A. Correct.

19 Q. And I think you have testified earlier -- and, again,
20 testified today -- that Mr. Stamatis and Mr. Shonder were very
21 surprised or shocked about that, correct?

22 A. Yes.

23 Q. And I think you told us that you recall Mr. Stamatis
24 actually leaving the office, going down and standing in front
25 of the Chicago River, correct?

1 A. That's what he had said, yes.

2 Q. Well, do you recall him leaving the office or wherever you
3 and Mr. Shonder and Mr. Stamatis were?

4 A. Yes.

5 Q. Okay. And if he was to testify in this case that that
6 happened, would you have any reason to doubt that that's where
7 he went?

8 A. No, he has already said in court that that's where he
9 went.

10 Q. And then he came back, and I think you told us that he
11 told you immediately that, I think your words were, as an
12 agent of the court -- or maybe it was officer of the
13 court -- agent of the court, he had to immediately disclose
14 what he learned to the court and to the Plaintiffs, correct?

15 A. Correct.

16 Q. Mr. Duke, does that sound to you to be a man that wanted
17 to intentionally withhold documents or information?

18 A. No.

19 Q. Doesn't it sound to you like that's a man that wanted to
20 immediately inform the court and the lawyers in this case of
21 what was going on?

22 A. Yes.

23 Q. Okay. And this issue about the auto-delete, that was
24 something that was discovered and cured, meaning "cured" that
25 the auto-delete was taken -- or shut off before Mr. Stamatis

1 and Mr. Shonder got involved in the case, correct?

2 A. I believe so, yes.

3 MR. HOLEVAS: Your Honor, if I may have one moment to
4 confer with Mr. Stamatis?

5 THE COURT: No problem.

6 MR. HOLEVAS: Thank you.

7 (Brief pause.)

8 MR. HOLEVAS: Thank you, your Honor.

9 BY MR. HOLEVAS:

10 Q. Mr. Duke, Mr. Stamatis just pointed out to me that perhaps
11 Mr. Shonder did not enter his appearance until a little after
12 him, closer to early '18.

13 Do you have a recollection one way or another on
14 that?

15 A. That sounds more like it to me, yes.

16 Q. Okay. Would your answer, though, to the questions that I
17 asked you about his involvement, similar to Mr. Stamatis, be
18 the same, regardless of whether I was off a little bit by the
19 time he entered his appearance?

20 A. Correct.

21 Q. Okay. And the searching that you were asked to do in this
22 case, and I think you have testified Mr. Leavens and his team
23 asked you to undertake those searches, and I think even later,
24 Mr. Smith asked you some questions here this morning about
25 Mr. Life asking you to go back and double-check some things;

1 do you remember that exchange?

2 A. Yes.

3 Q. Do you ever recall Mr. Stamatis ever asking you to perform
4 any searches, or was that something left to team number one?

5 A. I don't recall specifically where the e-mails would come
6 from. I mean, usually everyone would be Cc'd, and I would
7 just see directions and follow them.

8 MR. HOLEVAS: Okay. That's all I have.

9 Thank you very much, Mr. Duke.

10 Thank you, your Honor.

11 THE WITNESS: Thank you, sir.

12 MR. WOLFE: May I, your Honor?

13 THE COURT: Sure.

14 CROSS-EXAMINATION

15 BY MR. WOLFE:

16 Q. Good morning, Mr. Duke.

17 A. Good morning.

18 Q. We also have not met before these proceedings. My name is
19 Mark Wolfe, and I represent Steven Shonder.

20 The beautiful thing about being last is that there
21 are very few topics left to discuss. So I will be blissfully
22 short.

23 And I want to talk specifically about Mr. Shonder for
24 a moment. He was not one of the original attorneys you
25 retained in this case to assist you in this matter, correct?

1 A. Correct.

2 Q. All right. As I understand it, the universe of
3 Mr. Shonder's dealings in this case is sitting in on some
4 phone calls, never by himself, but always amongst the various
5 sets of attorneys that you have had, correct?

6 A. Correct.

7 Q. And the other -- then the one and only meeting that you
8 ever have had with him was this May meeting that has been
9 discussed at some length over the last couple days, fair?

10 A. Fair.

11 Q. He was not involved in any of the 50,000 documents that
12 have been produced in this case, fair?

13 A. Correct.

14 Q. He wasn't involved in the federal rule -- the mandatory
15 federal rule disclosures that have been talked about in this
16 case, correct?

17 A. Correct.

18 Q. He had nothing to do with obtaining the answers to the
19 questions -- the interrogatory questions and answers in this
20 case that you supplied, right?

21 A. Correct.

22 Q. He was not involved in determining the 20-or-so search
23 terms that have been discussed at length in these proceedings,
24 right?

25 A. Correct.

1 Q. He wasn't involved in hiring 4Discovery or any other
2 e-vendor with regard to searching computers or looking for any
3 sort of e-mails or anything of that sort, right?

4 A. I don't know about the -- we searched the Yahoo! e-mails.
5 I don't know if he was --

6 Q. Let me withdraw the question and do it better.

7 He was not involved in the selection of 4Discovery,
8 correct?

9 A. Correct.

10 Q. All right. The one and only discussion you have had
11 face-to-face with him was this May 2019 meeting that we have
12 discussed, correct?

13 A. Correct.

14 Q. And at that time, there was a revelation, if you will,
15 that there were some documents that perhaps have not been
16 reviewed or discovered in this case, fair?

17 A. Fair.

18 Q. And immediately upon him understanding that there was,
19 perhaps, an issue of additional documents, both Mr. Stamatis
20 and Mr. Shonder indicated that that information had to
21 immediately be provided to the court and to the other side,
22 fair?

23 A. Yes.

24 Q. All right. And after they got over their surprise and
25 their shock, as you have testified to, it was your

1 understanding that, in fact, efforts were then made to attempt
2 to get to the bottom of these documents that may need to be
3 disclosed to the other side, right?

4 A. Correct.

5 Q. And shortly after that, there was a determination that it
6 might be in everyone's best interest to -- for the attorneys
7 to withdraw from the case, fair?

8 A. Correct.

9 Q. And just to dot the "i" on this, you do not believe in any
10 way, shape, or form that Mr. Stamatis or Mr. Shonder had any
11 intent to hide documents, to delete documents, to not do
12 anything but fully support the production of documents that
13 you had in this case, fair?

14 A. Fair.

15 MR. WOLFE: All right. Thank you.

16 I have nothing else.

17 THE COURT: What's your estimate?

18 MR. DAVIS: 20 minutes -- 20, 30 minutes.

19 THE COURT: All right. We will take a break. We
20 will come back at 1:00 o'clock sharp.

21 Remember, you are under oath. Don't talk to anybody
22 about your testimony.

23 THE WITNESS: Yes, your Honor.

24 (Recess taken.)

25 THE CLERK: Recalling 12 CV 50324, DR Distributors,

1 LLC v. 21 Century Smoking, Inc.

2 THE COURT: Before we start, I apologize for being
3 late, but the federal courts are a hierarchal system. At the
4 apex is, at least here, is Chief Judge Pallmeyer. She is the
5 apex predator. I'm like a minnow. So that's why I'm running
6 late.

7 All right. Mr. Davis, are you ready?

8 MR. DAVIS: Yes, I am, your Honor.

9 REDIRECT EXAMINATION

10 BY MR. DAVIS:

11 Q. Mr. Duke, good afternoon.

12 A. Good afternoon.

13 Q. I have got a few follow-up questions to discuss with you,
14 some of the things that you spoke about today with some of the
15 other attorneys.

16 Do you understand that?

17 A. Yes.

18 Q. Okay. And you recall there has been a lot of questions
19 about chat, chat applications that you used?

20 A. Yes.

21 Q. And you used Gtalk?

22 A. Yes.

23 Q. And Yahoo! Messenger?

24 A. Yes.

25 Q. And Skype?

1 A. Yes.

2 Q. Okay. And earlier, you were asked about a chat you had
3 with Ms. Saraswat. I believe it was Plaintiff's Exhibit 37.
4 And that was one of the e-mails where you copied -- and
5 correct me if I'm wrong -- copied your chat communication on
6 Yahoo! Messenger into an e-mail and sent it to yourself.

7 Do you recall that?

8 A. Correct, yes.

9 Q. Okay. And now I want to direct your attention to another
10 chat session that you copied into an e-mail. Your attorney,
11 Mr. Salam, reviewed that with you the other day. It is
12 Plaintiff's Exhibit 17.

13 MR. DAVIS: If I can have that brought up again,
14 please.

15 BY MR. DAVIS:

16 Q. I ask you if you can take a look at that and tell me if
17 you recognize it.

18 A. Yes.

19 Q. And what is it?

20 A. Some type of a chat conversation that I copied over and
21 e-mailed to myself.

22 Q. And when you say "some type of a chat session," is there
23 anything in here that would tell you whether that was Gtalk or
24 Yahoo! or Skype or any one of your other chat messaging
25 programs you used?

1 A. I mean, I basically just used Yahoo! Messenger, so I would
2 assume it would be Yahoo! Messenger.

3 Q. Okay. And --

4 THE COURT: So there is no confusion, Yahoo!
5 Messenger is the same as Yahoo! Chat, correct?

6 THE WITNESS: Yes.

7 THE COURT: We all have that understanding.

8 MR. DAVIS: Thank you, your Honor.

9 THE COURT: Go ahead. We don't need any more
10 confusion. Thank you.

11 BY MR. DAVIS:

12 Q. And who were you chatting with?

13 A. Kirti Saraswat.

14 Q. And when did you chat with her?

15 A. It appears September 13th, 2010.

16 Q. And your company, 21 Century, existed in September of
17 2010, right?

18 A. Yes.

19 Q. Okay. And how long did this chat session last?

20 A. Is this the whole thing?

21 Q. There is three pages.

22 A. It looks like about an hour and 20 minutes.

23 MR. DAVIS: Okay. We move P-17 into evidence.

24 THE COURT: Any objection?

25 MR. SALAM: No objection.

1 THE COURT: It will be admitted. 17 is admitted.

2 Plaintiff's Exhibit 17 -- sorry -- Plaintiff's
3 Exhibit 17 is admitted.

4 I'm adding to the confusion. I apologize.

5 (Plaintiff's Exhibit 17 was offered and received in
6 evidence.)

7 BY MR. DAVIS:

8 Q. And in the body of this, I would ask you to review it and
9 tell me what you are discussing with Kirti Saraswat.

10 Take your time, and we can move the pages whenever
11 you would like.

12 A. It looks like SEO stuff for electronic cigarettes.

13 Q. All right. And you are talking about keywords?

14 A. Yes.

15 Q. And you are talking with her about SEO ranking; is that
16 right?

17 A. It appears so, yes.

18 Q. All right. And based on this chat, you are talking with
19 her about her buying keywords for your company, right?

20 A. Buying keywords?

21 Q. Yes.

22 I'm looking at the language on the third page, at the
23 top. This is 21C 1001953.

24 Maybe you can explain to me what she is saying there
25 at the top three lines.

1 A. That is the keyword, "buy electronic cigarette."

2 Q. "Buy electronic cigarette"?

3 A. Yes.

4 Q. So she is not buying them for you. She is telling you
5 what the keyword is?

6 A. That is the keyword, yes.

7 Q. And what will she -- will she take that and buy those
8 keywords for SEO marketing purposes or just use them in
9 connection with your website?

10 A. No, that's the keyword that she is using in connection
11 with the website.

12 Q. And where does she use it?

13 A. I don't know exactly what she is doing when she is doing
14 SEO. On articles outside the website, somewhere on the
15 website, I don't know exactly how to do that.

16 Q. I got you.

17 So she is doing SEO work for you at this time, right?

18 This is September of 2010?

19 A. It looks like it, yes.

20 Q. Okay. And she is working for you and your company, right?

21 A. Yes, she is definitely doing work.

22 Q. And the SEO work, that's like an active, ongoing process,
23 right, when you are doing SEO work, optimization?

24 Would you agree with that?

25 A. To be successful, yes.

1 Q. Right.

2 And in this chat, you guys are talking about articles
3 that she wants you to write and send to her; is that fair?

4 A. Yes.

5 Q. All right. And that's part of that process where you are
6 always changing what you are doing online and with keywords to
7 optimize your search engine rankings, right?

8 A. It sounds about right, yes.

9 Q. Okay. And did you monitor your results for your website,
10 21centurysmoking.com?

11 A. To the best of my ability, yes.

12 Q. And let me turn your attention now to a process you
13 described when we were talking about -- do you remember when
14 we were talking about inhaleinside.com, one of your websites?

15 A. Yes.

16 Q. All right. And you talked about a process of how you
17 created the websites; do you recall that?

18 A. Yes.

19 Q. Okay. And we focused on inhaleinside.com because we had,
20 and now in evidence, PX-74 and PX-75.

21 Do you remember I showed you --

22 A. Yes.

23 Q. Right.

24 That was your website and the source code, right?

25 A. Yes.

1 Q. And you described how you were -- some process where you
2 are copying other site source code and creating other
3 websites; is that correct?

4 A. Yes.

5 Q. And to do that, you used, and I wrote, Dreamweaver and
6 another application called "Notepad"; is that correct?

7 A. Yes.

8 Q. Did you use any other programs?

9 A. Not that I can recall at this time.

10 Q. All right. And referring to the Dreamweaver, it is a
11 program, right?

12 A. Yes.

13 Q. It is on your laptop?

14 A. Yes.

15 Q. And that's your main computer you use?

16 A. Yes.

17 Q. Okay. And you used Dreamweaver to create hypertext markup
18 pages for your website; is that right?

19 A. Hypertext -- http is -- hypertext markup is what?

20 Q. Yes.

21 Well, you described -- let me clarify.

22 You described, when you look at your computer and
23 Dreamweaver is open, you described a split screen?

24 Did I get that right?

25 A. Yeah, yeah, yeah.

1 Q. And one side is what?

2 A. One side is like the code, and one side is like what the
3 site actually looks like.

4 Q. When you say "what it actually looks like," that is what
5 like a human being looking at their monitor would see on your
6 website, right?

7 A. Exactly, yes.

8 Q. And the other side is the hypertext markup language, the
9 source code, right?

10 A. Okay. Yes.

11 Q. You say "Okay." Do you know that to be true?

12 A. I just didn't know the term "hypertext markup," but source
13 code, yes.

14 Q. The source code?

15 A. Yes, yes.

16 Q. Okay. And all those Dreamweaver website files, those are
17 saved on your laptop; is that right?

18 A. Yes.

19 Q. So when you are working on something on your laptop in
20 Dreamweaver, it is a file that you have saved on your laptop,
21 right?

22 A. Yes.

23 Q. And at some other date or time, once you are done or you
24 finished the file or the website, then you somehow load it up
25 into the Internet; is that right?

1 A. Yes.

2 Q. And you do that yourself?

3 A. Yes.

4 Q. Okay. Let me turn you back now to something you talked
5 about a few times, this company called "Automatic Cigarettes."

6 A. Okay.

7 Q. Okay. That's an e-cigarette company, right?

8 A. Yes.

9 Q. Okay. And you mentioned a few times -- actually, your
10 attorney specifically asked you about it when he was reviewing
11 all the -- remember that big list of e-mail accounts that is
12 in the new ESI report?

13 A. Yes.

14 Q. And one of the ones he asked you about is
15 info@automaticcigarettes.com; do you remember that?

16 A. Yes.

17 Q. And Mr. Salam asked you, he said, "Does that website have
18 anything to do with 21 Century Smoking, your company?"

19 Do you recall that question?

20 A. Does that e-mail address have anything to do with it --

21 Q. Uh-huh.

22 A. -- or does the website?

23 Q. No. He said does that website, automaticcigarettes, have
24 anything to do with 21 Century Smoking?

25 A. Okay.

1 Q. Do you remember that question?

2 A. Yes.

3 Q. And your answer was?

4 A. No.

5 Q. No, right?

6 But isn't it true that your company bought Automatic
7 Cigarettes, the company? You and your company purchased it
8 and integrated that company into 21 Century Smoking, your
9 current company; isn't that correct?

10 A. I would say, no, I didn't integrate it.

11 Q. All right. You are saying you didn't say that in your
12 deposition?

13 MR. DAVIS: Let's bring up Mr. Duke's June 16th,
14 2015, deposition, Page 93, please.

15 BY MR. DAVIS:

16 Q. Because you produced some documents in this case that said
17 Automatic Cigarettes, and if we look at page -- I'm
18 sorry -- starting at the bottom of 92, Page 92, Brent Duke
19 deposition, June 16, 2015, Line 19 on Page 93 -- sorry -- 92.

20 I can't even keep my own numbers right.

21 Do you see the question at the bottom that starts at
22 Line 19?

23 A. Yes.

24 Q. All right. So why don't you read that to the court.

25 A. "Q. It says in the second paragraph: 'Duke was

1 integral in the purchase and integration of a
2 competitor, Automatic Cigarettes.' What is that?"

3 Q. And your answer?

4 A. "A. It is a brand that we -- that 21 Century
5 Smoking purchased."

6 Q. And the next question?

7 A. "Q. And when you say '21 Century Smoking,' you mean
8 your corporation?

9 "A. Yes.

10 "Q. Do you remember when your company purchased
11 the Automatic Cigarette business?

12 "A. No."

13 Q. All right. So isn't it true that that company has
14 everything to do with your current company, right?

15 You bought it. You own it. You integrated it
16 yourself. Isn't that right?

17 A. We own it, but, no, no part of it has ever -- it is two
18 separate companies. The money from that one goes to the same
19 place as the money from 21 Century Smoking.

20 Q. Okay. So your testimony on June 16th of 2015 is false,
21 right?

22 You said that your company bought it. What you just
23 described, you didn't testify to, right?

24 A. You said -- you're quoting something that says: "Duke was
25 integral in the purchase and integration." I don't know where

1 that is coming from.

2 Q. That is coming from a document you created and produced in
3 this case talking about what you were doing with your
4 business. I believe it was like a business plan or pro forma.
5 These are documents you produced.

6 I'm trying to confirm you said the other day, when
7 your counsel asked you did that website have anything to do
8 with 21CS, you said "No," without qualification.

9 But at your deposition four years ago, you said you
10 bought it, you integrated it, it's owned by your company, and
11 now you have another story; is that right?

12 So what's the final answer? To use Mr. Smith's
13 question before, what's your final answer today?

14 A. My final answer would be I don't see me saying here that I
15 integrated it. I see that I'm reading from something that I
16 wrote. So I'm just curious where that came from. That's all.

17 MR. DAVIS: Okay. All right.

18 THE COURT: Can you go to the next page for me, 93,
19 for a second?

20 MR. DAVIS: Certainly.

21 THE COURT: All right. Thank you.

22 BY MR. DAVIS:

23 Q. I want to turn your attention now to something that
24 Mr. Smith questioned you about. He talked about something the
25 Leavens Strand attorneys were doing with what he characterized

1 as a -- and I wrote -- "secondary review."

2 Do you remember those questions he asked you?

3 A. Yes.

4 Q. And had you ever heard that before today, that your

5 attorneys were doing secondary reviews in your case?

6 A. I don't know if I have heard that exact term, no.

7 Q. Were you aware that your attorneys were doing anything in
8 terms of contacting you to check their work or do a
9 double-check against their work, searching the data in this
10 case and producing documents?

11 Did you ever hear that before today?

12 A. That's hard for me to answer. I don't fully understand
13 the question.

14 Q. Okay. Let me try and rephrase it.

15 So Mr. Smith asked you today about the secondary
16 reviews that he said his clients, the Leavens Strand
17 attorneys, were doing throughout this case, right?

18 A. Correct.

19 Q. And I understood from his questions that it's some sort of
20 double-check they were doing, that they would search the
21 records to provide discovery in this case, and they would look
22 at it, and then they would call you and ask you to run the
23 searches again in some way to see what you obtained, to do a
24 check, to see if that data matched.

25 Do you recall that today?

1 A. I recall discussing it today, yes.

2 Q. Is this the first time you have ever heard that this was
3 happening in your case?

4 A. It is hard for me to say because you are asking what they
5 were doing. They have never really discussed with me what
6 they were doing ahead of time. I just know they were reaching
7 out to me and asking for documents. I don't have any clue
8 what's going on outside of me.

9 Q. Right. Fair enough.

10 So none of your prior attorneys ever said to you,
11 "Hey, we are doing a secondary check. We are doing a
12 double-check. We are auditing our work to see if your search
13 matches our search." You never heard that before, right?

14 A. I don't recall hearing that, no.

15 Q. Okay. And do you ever recall your prior attorneys telling
16 you there was a problem when they did any of their secondary
17 research or double-checks or any kind of -- any time they had
18 a conversation with you, did they ever tell you they were
19 having a problem or they discovered a problem when they were
20 doing the secondary checks?

21 A. Well, yes, the Saraswat e-mails that were discussed
22 recently, they reached out to me and said that they were
23 having a problem finding the e-mails, yes.

24 Q. And was that the first time that they raised a problem
25 with you when they were doing these secondary checks as far as

1 you are aware?

2 A. I would have to look through all my records. I'm not
3 sure.

4 Q. And the records you would look at would be what?

5 A. E-mails.

6 Q. You would look at your e-mails to determine what people
7 told you, what was said, and when things happened, right?

8 A. Exactly.

9 Q. Okay. Now, I want to turn to the time that you were just
10 referring to when the issue or the problem arose with the
11 Yahoo! e-mail, right?

12 A. Okay.

13 Q. That's March of 2018?

14 A. Yes.

15 Q. Does that sound right?

16 A. Yes.

17 Q. And we know from the e-mails that your prior attorney,
18 Travis Life, e-mailed you, right, asking you to run some
19 searches?

20 A. Yes.

21 Q. Is that right?

22 And your testimony is that you sent him an e-mail
23 with a file attached, and that file collected the results of
24 your search; is that accurate?

25 A. Yes.

1 Q. And do you still have that e-mail?

2 A. Yes.

3 Q. And that has the file still attached?

4 A. Yes.

5 Q. And the file that's attached are the documents that you
6 found running the searches that Mr. Life asked you to search
7 on or about March 17th of 2018?

8 A. Yes. So the saved e-mails that are then put into a
9 folder, and then the folder is sent. So if that's what you
10 are asking, yes.

11 Q. Yes. Got it.

12 So it is not like a .pdf with multiple pages. It is
13 a folder with e-mail files within it?

14 A. Correct.

15 Q. Got it.

16 All right. And you still have that e-mail with that
17 folder attached to it?

18 A. Yes.

19 Q. And why haven't you produced it?

20 A. I don't know what you are asking.

21 Q. Have you given it to your new attorneys?

22 A. I gave it to my previous attorneys.

23 Q. But I'm saying did you give it to your new attorneys, the
24 e-mail that you sent to Mr. Life on or about March 17th, 2018?

25 A. I don't know.

1 Q. Have you reviewed it yourself recently after the motion
2 for sanctions was filed?

3 Did you look at that file?

4 A. No.

5 Q. Did you look at it to see if the documents that were
6 produced by your attorneys to our firm on the evening of
7 March 19th matched with what you gave them on March 17th?

8 Have you done that?

9 A. No.

10 Q. Okay. Now, I want to turn your attention to some
11 questions, something that Mr. Smith and Mr. Holevas both
12 talked about.

13 In the early stage of this case, right, there was a
14 document production from your company to my client, right?

15 A. Yes.

16 Q. And I wrote down how it was described. Mr. Smith said
17 50,000 records were produced, and Mr. Holevas said that there
18 was 50,000 documents produced.

19 Do you recall their statements about that in court
20 earlier today?

21 THE COURT: All right. Hold on a second.

22 Is there an objection?

23 MR. SMITH: Objection. I believe my statement was
24 "pages," your Honor.

25 MR. DAVIS: I wrote and put quotes around the word

1 "records."

2 THE COURT: Okay. I will overrule. If he thinks it
3 is records or pages, he will tell us.

4 BY MR. DAVIS:

5 Q. Do you have a recollection of the way Mr. Smith
6 characterized your production?

7 A. I don't have a recollection of the exact characterization.
8 I know what you are talking about.

9 Q. You know what I'm talking about, right?

10 A. Yes.

11 Q. Do you know if it was 50,000 documents or was it 50,000
12 pages?

13 A. I never actually saw the discovery, so I have no clue.

14 Q. You have no clue.

15 But if they are talking about this in terms of 50,000
16 pages, and Mr. Smith just stood up to correct that, let's talk
17 about that for a second, and I want to clean it up so there is
18 no misunderstanding with the court about this.

19 You understand a document can be multiple pages,
20 right?

21 A. Of course.

22 Q. Right.

23 So if I give you a deposition transcript, it can be
24 500-pages long, right?

25 A. Correct.

1 Q. That's one document that's 500 pages?

2 A. Yes.

3 Q. All right. And your company produced about 50,000 pages
4 of documents in the early stages of this case -- I will
5 represent that to you -- right?

6 A. I believe you.

7 Q. Okay. Now, in that production, there were documents, for
8 example, like you produced a document, one document, that was
9 mailing labels, and it was Bates-stamped 21C 17114 to -- Are
10 you ready? -- 24113. So we got a 7,000-page printout of
11 mailing labels.

12 Do you recall that being produced in this case?

13 A. Again, I never looked at the production.

14 Q. All right. You don't dispute it in any way, though,
15 right? I'm telling you that's what was produced.

16 A. No, no reason to dispute it.

17 Q. Now, interestingly, how many times do you think you
18 produced that mailing label document to us in your initial
19 production?

20 MR. LEONARD: Objection, lacks foundation and calls
21 for speculation.

22 THE COURT: Overruled.

23 BY MR. DAVIS:

24 Q. Do you know how many times you produced it?

25 A. Probably however many times it came against the search

1 terms.

2 Q. Okay. So within that 50,000 pages of documents that
3 Mr. Holevas and Mr. Smith talked about --

4 THE COURT: It is "Holevas," by the way.

5 MR. DAVIS: Excuse me?

6 THE COURT: Holevas.

7 MR. DAVIS: Holevas.

8 I apologize, your Honor.

9 THE COURT: That's all right.

10 BY MR. DAVIS:

11 Q. You have over 20,000 pages of that production are three
12 documents that are mailing labels. The first one I have
13 already denoted. The second one was 21C 24114 through 31113,
14 and that was about 6,100 pages. The third one was
15 Bates-stamped 21C 31114 through 21C 38113. That was a little
16 over 7,000 pages.

17 All right. You understand the difference, right,
18 between documents and pages, right?

19 A. Yes, I do.

20 Q. Okay. Now, how many e-mails, if you know -- of those
21 50,000 pages, how many e-mails did your company produce in the
22 initial production; do you know?

23 A. No.

24 MR. DAVIS: I have nothing further, your Honor.

25 MR. LEONARD: May I proceed, your Honor?

1 THE COURT: Why?

2 MR. LEONARD: Follow-up questions.

3 THE COURT: No.

4 MR. LEONARD: Do you want us to wait until our
5 case-in-chief to do that?

6 THE COURT: Yes.

7 MR. LEONARD: All right. Thank you, Judge.

8 THE COURT: If anybody is asking questions, it is
9 going to be me right now.

10 MR. SMITH: Your Honor, if I could, could I move some
11 exhibits into evidence?

12 THE COURT: As soon as I'm done. You might have more
13 documents based upon my questioning.

14 But remind me, so we do that.

15 MR. SMITH: I will, your Honor.

16 THE COURT: Okay. Thank you.

17 (Brief pause.)

18 THE COURT: I think we have got this covered: "SEO"
19 stands for "search engine optimization," correct?

20 THE WITNESS: Are you asking me, your Honor?

21 THE COURT: Yes.

22 THE WITNESS: Yes, your Honor.

23 THE COURT: Just to make sure we all have the same
24 nomenclature.

25 I'm going to ask you this question, and I'm going to

1 tell you why I'm asking it: Do you have the financial ability
2 to pay \$750,000 or more in monetary sanctions?

3 THE WITNESS: No, I do not, your Honor.

4 THE COURT: Okay. I'm asking the question because
5 there is a motion for sanctions pending, as you know, and I
6 need to first determine was there a violation; second, if I do
7 determine a violation, I need to determine what, if any,
8 sanctions I need to impose.

9 Obviously, I'm not going to impose a sanction that is
10 a Pyrrhic victory. I'm not going to require you to pay -- or
11 order you pay \$750,000 or more if you can't pay it because
12 that's not much of a sanction.

13 So that's why I'm asking the question. I'm not
14 delving into your personal finances, okay?

15 THE WITNESS: Okay, your Honor.

16 THE COURT: All right. That's the only question I
17 have. Thank you very much.

18 You can step down.

19 We are going to go through the exhibits now and see
20 what's admitted, okay?

21 THE WITNESS: Thank you, your Honor.

22 (Witness excused.)

23 MR. SMITH: Yes, your Honor. We would -- I admit I'm
24 not as organized I should be, so I may be offering some
25 exhibits that have previously been offered, your Honor.

1 THE COURT: Okay.

2 MR. SMITH: Just to be clear, we would like to offer
3 the Leavens Strand Exhibits 9, 13, 14, 18, 19, and 20.

4 THE COURT: 18, 19, and 20.

5 Okay. My notes show that 18 is already admitted.

6 So the motion is to admit Leavens Strand Exhibits 9,
7 13, 14, 18, which my records show is already admitted, 19, and
8 20.

9 Mr. Salam, Mr. Leonard, any objections to any of
10 those?

11 MR. LEONARD: I think they will probably prove up 14,
12 Judge. So at this time, there is not a foundation for 14.
13 It's another attorney's notes --

14 THE REPORTER: I'm sorry. I can't hear you.

15 THE COURT: Just tell me which ones you have an
16 objection to.

17 MR. LEONARD: No. 14, foundation.

18 THE COURT: Okay. And all the others, no objection?

19 MR. LEONARD: No objection.

20 THE COURT: So 9, 13, 18, which I already have as
21 admitted, 19, and 20.

22 Mr. Davis, did you have any objection to any of
23 those?

24 MR. DAVIS: No objection.

25 THE COURT: Okay. Let me take a look at 14 right

1 now.

2 Can you put it up on the screen?

3 Thank you. Thank you very much.

4 Oh, these are Ms. Liberman's notes.

5 MR. SMITH: Yes, that's correct.

6 THE COURT: Okay. Mr. Duke referred to them, but he,
7 obviously, didn't write them up.

8 I assume we are going to have Ms. Liberman testify at
9 some point?

10 MR. SMITH: I'm told that opposing counsel are going
11 to call her.

12 THE COURT: Okay. All right. So at this point, not
13 admitted, without prejudice. So let's remember to come back
14 to 14 if you want to get it admitted.

15 (Leavens Strand Exhibits 9, 13, 18, 19, and 20 were offered
16 and received in evidence.)

17 MR. SMITH: Understood.

18 And can I just verify: I think these are all already
19 in, but otherwise I would offer them.

20 THE COURT: Sure. Go ahead.

21 MR. SMITH: They are Plaintiff's 23, 24, 37, and 65.

22 THE COURT: Plaintiff's 23, 24, 37, and 65.

23 All right. I will say those slower. I apologize.

24 All right. Plaintiff's 23, 24, 37, 65.

25 Mr. Leonard?

1 Mr. Salam, any objection to those?

2 Do you still need to dig your way through the
3 documents?

4 MR. LEONARD: I was checking one last one.

5 No objection.

6 THE COURT: Mr. Davis, any objection to Plaintiff's
7 23, 24, 37, and 65? Seeing as they are your exhibits, I'm
8 thinking you are okay with them.

9 MR. DAVIS: Yes, then they are already in evidence,
10 so I'm fine with it.

11 THE COURT: So we will make sure those are admitted
12 just in case they are not.

13 (Plaintiff's Exhibits 23, 24, 37, and 65 were offered and
14 received in evidence.)

15 MR. SMITH: And my last one, your Honor -- I'm sorry.
16 I'm jumping the gun.

17 The last one is Defendant's 5, which I'm virtually
18 certain is in, but in an abundance of caution.

19 THE COURT: Okay. Any objection to Defendant's 5?

20 MR. LEONARD: No objection, Judge.

21 MR. DAVIS: No objection. It is in already.

22 THE COURT: Defendant's 5, that's what my notes show,
23 too.

24 Okay. Anything else?

25 MR. SMITH: That's it. Thank you, your Honor.

1 MR. DAVIS: Your Honor, we would like to move some
2 further exhibits in also.

3 THE COURT: Okay.

4 MR. DAVIS: I have raised this a few times: 1
5 through 61 of our list were all exhibits that were attached to
6 our motion for sanctions.

7 THE COURT: 1 through 61. Okay.

8 MR. DAVIS: 1 is in. 2 through 10 are all the
9 e-mails that are part of Exhibit 1.

10 THE COURT: Okay.

11 MR. DAVIS: They are contained within Exhibit 1. We
12 just broke them out separately.

13 THE COURT: All right. Plaintiff's 1 through 61, and
14 you mentioned that the first -- what was it?

15 1 is in.

16 2 through 10 are all e-mails. Okay.

17 MR. DAVIS: And 2 through 10 are all included in
18 PX-1. They are just separated out --

19 THE COURT: Oh, I got you. So they have just been
20 separated out so they are standing alone?

21 MR. DAVIS: That is right.

22 THE COURT: I understand.

23 MR. DAVIS: I don't want there to be any confusion
24 later when we refer to 1. They are in evidence already. I
25 just wanted to get that on the record.

1 THE COURT: Okay. I understand what you are doing.

2 MR. SALAM: I'm just trying to confirm that, your
3 Honor. I'm just checking the Bates numbers.

4 THE COURT: Okay. Tell me when you have completed
5 your review.

6 MR. SALAM: I'm sorry. Exhibit 10, I don't see a
7 Bates number or --

8 THE COURT: There is a Bates number 21C 63530.

9 MR. SALAM: For No. 10?

10 THE COURT: For Plaintiff's No. 10.

11 MR. SALAM: I must have a missing page.

12 Hold on a second. I apologize. I stuck something on
13 top of that in the binder. I apologize.
14 63530.

15 All right. With that representation, we have no
16 objection, your Honor.

17 THE COURT: Okay. That's going to be 1 through 10.

18 (Plaintiff's Exhibits 1 through 10 were offered and received
19 in evidence.)

20 THE COURT: Okay. Go ahead, Mr. Davis.

21 MR. DAVIS: The next set, 11 through 16, are more of
22 the same. They are e-mails between Mr. Duke and Ms. Saraswat.
23 They are business records. They are a part of our motion.
24 There has been no -- we couldn't go through, with the time,
25 through every e-mail.

1 THE COURT: Sure. I understand.

2 MR. DAVIS: But they are part of the motion for
3 sanctions. I don't recall anything in the reply brief that
4 objected to any particular document in 1 through 61, but we
5 would seek to move 11 through 16 into evidence.

6 THE COURT: Okay. 11 through 16, any objection,
7 Mr. Leonard?

8 Mr. Salam?

9 MR. LEONARD: No objection.

10 THE COURT: All right. Those will be admitted.
11 (Plaintiff's Exhibits 11 through 16 were offered and
12 received in evidence.)

13 THE COURT: All right. Go ahead, Mr. Davis.

14 MR. DAVIS: So we have 17 is in evidence.

15 THE COURT: Yes.

16 MR. DAVIS: 19, those were the deps. That's fine.
17 23, 24, 25, 26, 27 are in evidence.

18 31, 32 are in evidence.

19 We also move PX-34 on the same basis. Again, it's
20 another business record. It is an e-mail between Duke and
21 someone named Otis Chandler. Same basis as before.

22 THE COURT: All right. So that's Plaintiff's 34.
23 Any objection to Plaintiff's 34?

24 MR. LEONARD: No objection.

25 THE COURT: All right. 34 will be admitted.

1 (Plaintiff's Exhibit 34 was offered and received in
2 evidence.)

3 MR. DAVIS: 35 is in evidence.

4 36 is in evidence.

5 38 through 46, again, same offer, part of our motion
6 for sanctions, business records, e-mails between Mr. Duke and
7 Mr. K-o-s, Kos. We move all those in.

8 THE COURT: You said 38 through?

9 MR. DAVIS: 49.

10 THE COURT: Oh, I thought you said 46.

11 So it is 38 through 49?

12 MR. DAVIS: Correct.

13 THE COURT: All right. Hold on.

14 MR. LEONARD: Going through 49?

15 THE COURT: 38 through 49. Any objection,

16 Mr. Leonard?

17 Mr. Salam?

18 MR. LEONARD: No objection.

19 THE COURT: Okay. Those will be admitted.

20 (Plaintiff's Exhibits 38 through 49 were offered and
21 received in evidence.)

22 MR. DAVIS: 53, it is another Kos e-mail to Duke.
23 The same -- move on the same basis.

24 THE COURT: 53.

25 Any objection to 53?

1 MR. LEONARD: Just a second, your Honor.

2 THE COURT: Take your time.

3 MR. LEONARD: No, no objection.

4 THE COURT: 53 is admitted.

5 (Plaintiff's Exhibit 53 was offered and received in
6 evidence.)

7 MR. DAVIS: We move 56. It is e-mails from
8 Defendants' 3/19/2018 production. It references the online
9 chat communications between Mr. Duke and Ms. Saraswat,
10 business records.

11 MR. LEONARD: No objection, your Honor.

12 THE COURT: 56 will be admitted.

13 (Plaintiff's Exhibit 56 was offered and received in
14 evidence.)

15 MR. DAVIS: 59, it's an e-mail between Mr. Duke and
16 his mother. It was in the native data. It's a business
17 record. It was redacted by Plaintiff's counsel. We also seek
18 the admission of that document.

19 MR. LEONARD: No objection.

20 THE COURT: Plaintiff's 59 is admitted.

21 (Plaintiff's Exhibit 59 was offered and received in
22 evidence.)

23 THE COURT: Anything else, Mr. Davis?

24 MR. DAVIS: 60 and 61 on the same basis. 61 is --

25 MR. LEONARD: No objection.

1 THE COURT: No objection, 60 and 61 will be admitted.
2 (Plaintiff's Exhibits 60 and 61 were offered and received in
3 evidence.)

4 MR. DAVIS: PX-72, we offer into evidence. It's an
5 e-mail between our firm and the Leavens Strand firm with the
6 ESI search terms. We have talked about it, but I don't think
7 it's in evidence. PX-72.

8 THE COURT: Hold on one second. Let me get there.

9 MR. SALAM: No objection, your Honor. I believe it
10 may be admitted as another exhibit as well, but we have no
11 objection.

12 THE COURT: 72 will be admitted.
13 (Plaintiff's Exhibit 72 was offered and received in
14 evidence.)

15 MR. DAVIS: I think that's all I have, your Honor.

16 THE COURT: Okay. Who would be the next witness,
17 Mr. Davis?

18 MR. DAVIS: The next witness on Plaintiff's case,
19 your Honor, is Thomas R. Leavens.

20 (Witness duly sworn.)

21 MR. von OHLEN: Your Honor, just for clarity sake, we
22 are calling Mr. Leavens as an adverse witness pursuant to
23 Rule 611(c) (2).

24 THE COURT: Okay.

25

1 THOMAS R. LEAVENS, PLAINTIFF'S WITNESS, SWORN

2 DIRECT EXAMINATION (Adversely)

3 BY MR. von OHLEN:

4 Q. Good afternoon, Mr. Leavens.

5 A. Good afternoon.

6 Q. You first filed your appearance in this case on

7 October 3rd, 2012, correct?

8 A. Whatever the record shows, yes.

9 Q. And the record is right in front of you. It should be.

10 If you look down, you will see your appearance form.

11 Is that your appearance form that you filed on

12 October 3rd, 2012?

13 A. Yes.

14 Q. Okay. And that's your electronic signature that's

15 attached to that appearance form, the second box?

16 A. Yes.

17 Q. Okay. And you stated in that appearance form that you

18 were the lead counsel in this case, a member of the trial bar,

19 and that you would be the trial attorney in the event that the

20 case reached trial; is that all correct?

21 A. It was correct at the time, yes.

22 Q. Okay. And when you say "It was correct at the time," you

23 haven't amended that appearance form in any way, have you?

24 A. I don't know. I'm not conducting the trial, of course.

25 Q. Well, I will make a representation to you that I have

1 looked over the entire document, and I have never seen an
2 amended appearance form where you indicated that these were
3 not your roles in the case.

4 Do you have any reason to doubt that?

5 A. I don't think I filed an amended appearance.

6 Q. Okay. And let's turn to your appearance.

7 MR. von OHLEN: Let's put up 63.

8 BY MR. von OHLEN:

9 Q. Take a look at that as well, Plaintiff's 63.

10 And you reiterated all those representations on
11 July 16th, 2013, when Brent Duke was added as an individual
12 Defendant, and you filed an appearance on his behalf then; is
13 that correct, sir?

14 A. Yes.

15 Q. Okay. Thus it would be accurate to state that, at least
16 according to the court's records and docket, that you have
17 been the lead counsel in this case from the time of your first
18 appearance on October 3rd, 2012, until the date that your
19 motion to withdraw was granted in early June 2019; isn't that
20 all correct, sir?

21 A. Well, as I explained, the circumstances are different than
22 what is reflected. I did not file an amendment to that
23 appearance, but I have not been the lead counsel for some
24 time.

25 Q. Okay. But you made these representations, and they were

1 never amended. You never advised the court that you were not
2 lead counsel, correct?

3 A. That's correct.

4 Q. Are you saying somebody else is lead counsel other than
5 you in this case?

6 A. At the time of the withdraw, yes.

7 Q. Okay. Fair enough.

8 So before you withdrew in early June of 2019, at all
9 times up until then, you were the lead counsel in this case,
10 correct?

11 A. No.

12 Q. You were not?

13 A. I was not.

14 Q. So who else was lead counsel?

15 A. Mr. Peter Stamatis assumed that responsibility at some
16 point after his appearance, up to the withdraw.

17 Q. Okay. So if we looked at Mr. Stamatis's form, appearance
18 form, it would indicate he was lead counsel in this case; is
19 that your understanding?

20 A. He was not lead counsel when he filed his appearance.

21 Q. Okay. Did Mr. Stamatis ever file a document with this
22 court or advise this court that he was the lead counsel in
23 this case?

24 A. I don't know.

25 Q. Okay. And before we go on, we will get Mr. Stamatis's

1 appearance, but I will represent to you that he indicated that
2 he wasn't lead counsel in this case.

3 Do you have any reason to dispute that?

4 A. That he --

5 Q. Let me clarify.

6 When he filed his appearance form in this case, there
7 is a box that he can check. You can be lead counsel or not
8 lead counsel. I will represent to you that he filed that he
9 is not lead counsel.

10 A. Well, that may have been true at the time he filed his
11 appearance.

12 Q. Okay. And did he ever file an amended appearance to
13 indicate that he was lead counsel?

14 A. I don't know.

15 Q. Okay. But in any event, the docket of the court would
16 reflect the accuracy on those things; would you agree with me
17 on that?

18 A. I would disagree.

19 Q. Oh, okay. So that the court records are inaccurate, and
20 some agreement between you and Mr. Stamatis is more accurate
21 as to who was lead counsel?

22 A. I think that's correct.

23 Q. So when did you step away and not be lead counsel anymore?

24 A. I don't think that there is an exact date, but
25 Mr. Stamatis was assuming more and more responsibilities. I

1 would put it at some time maybe in 2017 or so.

2 Q. Okay. So did you ever have a conversation with

3 Mr. Stamatis and say, "Hey, you are lead counsel now; I'm

4 not"?

5 A. Yes, I did.

6 Q. Okay. And I will represent to you that there were, I

7 believe, 22 depositions taken in this case. It's hard to

8 count them because Mr. Haas was taken several times. But

9 about 22 depositions depending on if you double count some.

10 Do you know how many depositions you showed up at?

11 A. I think I was at all but the ones that were done by

12 Mr. Life.

13 Q. Which would have been one, right?

14 A. I was not at Edmiston's. I don't think I was --

15 Q. At Edmiston's, correct, Mr. Life was.

16 A. I don't think I was at the one with Mr. Hough. Perhaps I

17 was, but that's what my recollection is.

18 Q. So would it be fair to say, if there was 22, that you were

19 at somewhere between 19 and 20 of the depositions that were

20 taken in this case?

21 A. That I attended, yes.

22 Q. Yes.

23 Attended, was of record?

24 A. Correct.

25 MR. von OHLEN: Okay. We would move Exhibit 62 and

1 63 into evidence, please.

2 THE COURT: Any objection?

3 MR. LEONARD: No objection.

4 THE COURT: I will take judicial notice of it, too.

5 Okay. Plaintiff's Exhibit 62 and 63 will be
6 admitted.

7 (Plaintiff's Exhibits 62 and 63 were offered and received in
8 evidence.)

9 BY MR. von OHLEN:

10 Q. Can you please describe the circumstances by which you
11 were originally retained by Mr. Duke or his company in this
12 case?

13 A. I was contacted by him at the recommendation of his prior
14 counsel, I believe. I don't recollect necessarily. But he
15 contacted me by telephone and introduced himself and described
16 the circumstances of his being sued, and he needed defense of
17 the lawsuit. And I'm trying to remember how much of an
18 exchange that we had before he came into my office, but very
19 soon after his first call, he came into the office, and we
20 were engaged as his counsel.

21 Q. Okay. So if I understand the timing correct, it sounds
22 like he had been served with a complaint, and in between that
23 time and when some responsive pleading was due, he called you,
24 interviewed you, and eventually retained you; is that correct?

25 A. Correct.

1 Q. And did there come a time between that first phone call
2 when you actually met him?

3 A. Yes.

4 Q. Okay. And --

5 A. Very soon after the first phone call.

6 Q. Okay. So within days?

7 A. Correct.

8 Q. Okay. And where was that meeting?

9 A. At our office at 203 North LaSalle in Chicago.

10 Q. Who else was there, other than you and Mr. Duke?

11 A. I don't recall that anybody else was at that meeting.

12 Q. So just the two of you?

13 A. That's what I recall.

14 Q. Okay. Were there other initial meetings before you filed
15 your appearance in this case or was that the only one?

16 A. You are talking about face-to-face meetings?

17 Q. Face-to-face, yes.

18 A. It wasn't -- that was not the only one.

19 Q. Okay. Tell us what the next one was, who was there, when
20 it was.

21 A. I don't know what the next one was. The one I remember is
22 going to his apartment, which is in Chicago on Ashland, and I
23 met with him there.

24 Q. Okay.

25 A. And I believe I was by myself when I did.

1 Q. And could you put a month on that?

2 A. It probably was September given what you have told me
3 about the appearance form.

4 October 2nd, is that what you said?

5 Q. It was October 3rd, I believe.

6 A. Right.

7 Q. Yes, October 3, 2012.

8 A. So it was probably sometime in September.

9 Q. In September. Okay.

10 And was there any other initial meetings before a
11 responsive pleading was filed?

12 A. Those are the two that I remember face-to-face.

13 Q. Okay. And you had some telephone calls or e-mail
14 exchanges or written exchanges with him as well?

15 A. Correct.

16 Q. Okay. Another name was mentioned very early on in this
17 case, a Matt Rieger. Was that the attorney who you just
18 mentioned that referred Mr. Duke to you, Matt Rieger?

19 A. That's only received information. I don't know for sure.

20 Q. Okay. Do you know who Matt Rieger is?

21 A. I do not.

22 Q. Okay. So you have never had any correspondence or contact
23 with him in connection with this case?

24 A. Nothing that I can recollect, no.

25 Q. You never got a copy of Mr. Rieger's file that he had as a

1 result of his discussions with Mr. Duke about trademark
2 issues; is that correct?

3 A. I did get some documents. I got a draft complaint. I
4 received a cease-and-desist letter that had been sent. I
5 don't remember anything else besides those two documents.

6 Q. Do you remember if you received them from Mr. Rieger or
7 Mr. Duke or somebody else?

8 A. I think I got them from Mr. Duke.

9 Q. Okay. What was the nature of your relationship to
10 Mr. Salam, Kevin Salam, in this case before he became an
11 attorney of record in August of 2019?

12 MR. LEONARD: Objection to relevance.

13 MR. von OHLEN: There is a lot of things stated that
14 he has been involved, as well as --

15 THE COURT: There was that meeting, so overruled, but
16 tie it up and then show me relatively quickly.

17 MR. von OHLEN: I will tie it up in about two
18 minutes.

19 THE COURT: Okay.

20 BY MR. von OHLEN:

21 Q. Do you recall the question?

22 A. I don't.

23 Q. Okay. It's just what was the nature of your relationship
24 with Mr. Salam before he became attorney of record in this
25 case?

1 A. I knew him through his representation of Mr. Duke in
2 the -- initially, in the insurance defense litigation, the
3 declaratory judgment action that was filed by the insurance
4 company.

5 Q. And how did you come to know him?

6 A. He knew Mr. Stamatis, and Mr. Stamatis recommended him as
7 being somebody who had expertise in that area.

8 Q. So Mr. Stamatis recommended -- I'm sorry -- I'm going to
9 have to follow that again.

10 Mr. Stamatis recommended you?

11 A. No, Mr. Stamatis recommended Mr. Salam.

12 Q. Mr. Salam for the insurance coverage issue?

13 A. Correct.

14 Q. Okay. How does Mr. Stamatis get involved that he is the
15 one recommending? Because we don't see Mr. Stamatis on the
16 scene until June of 2015.

17 So what was his involvement prior to June 2015?

18 A. Well, I met Mr. Stamatis in, I think, 2014. I might have
19 met him late in 2013. But we had a mutual client, and I
20 remember having a conversation with him about a particular
21 matter for that client. I can't remember how long after that
22 that we connected again on another matter that he had, but he
23 had a trademark, some litigation that he needed some
24 consulting about, and I helped him with that matter.

25 Q. Okay. So you meet Mr. Stamatis and somehow through -- you

1 correct me if I'm wrong -- somehow through his conversation
2 with you and his relationship with you, you come to ask him
3 for a recommendation for a coverage lawyer and that results in
4 the recommendation of Mr. Salam to Mr. Duke?

5 I'm sorry. That's a long question, but I'm trying to
6 get the labyrinth here.

7 A. Well, the sequence is I knew Mr. Stamatis, and
8 Mr. Stamatis was involved at that point in this lawsuit, and
9 the declaratory judgment action was filed by the insurance
10 company, and Mr. Duke and 21 Century needed defense of that
11 lawsuit, and Mr. Stamatis made the recommendation of
12 Mr. Salam. That's how I remember that it happened.

13 Q. I hear that, and thank you for that answer.

14 But in that answer, I heard that Mr. Stamatis was
15 involved in this case, and it sounded to me like it was prior
16 to when he filed his appearance in this case, which, as we
17 have heard, is June 2015.

18 Was that what you meant to say?

19 A. Well, he was involved with the case.

20 Q. Okay. And tell me --

21 THE COURT: Before June of 2015?

22 THE WITNESS: Yes. Well, he -- well -- I will let
23 you ask the question.

24 BY MR. von OHLEN:

25 Q. Here is the great open-ended question: What did he do?

1 What was his involvement?

2 THE COURT: And when did he do it?

3 THE WITNESS: I first spoke to Mr. Stamatis about
4 this case after the settlement conference that we had here
5 that was unsuccessful.

6 MR. von OHLEN: Okay.

7 THE WITNESS: And it appeared as if this case was
8 going to actually go to trial because of the failed
9 settlement. So I called Mr. Stamatis, and I don't know that I
10 talked to him about the case before that or not. I don't
11 recollect. But what I do recollect the first time was that I
12 spoke to him about the case and wanted to see whether he would
13 be interested in assisting.

14 His role initially was with respect to just some
15 general consulting. We consulted with him with respect to the
16 defamation action that we were adding to the complaint, and we
17 asked for his recommendation for an e-discovery consultant.
18 He did not become active in the case in the sense of making
19 appearances at depositions or anything like that until later
20 in 2015.

21 I don't recall which deposition he appeared at
22 initially, but he did finally enter his appearance and was
23 active in the case after that.

24 THE COURT: I'm going to pause you right there.

25 So is it your testimony that after the settlement

1 conference, you contacted Mr. Stamatis or you were talking to
2 Mr. Stamatis and Mr. Stamatis recommended Mr. Salam?

3 Is that what you are saying?

4 THE WITNESS: I believe the recommendation -- I
5 didn't know Mr. Salam independently.

6 THE COURT: And I'm not saying you did.

7 I'm just going through the chronology, and this
8 is -- correct me if I'm wrong, but is it your testimony that
9 after the settlement conference, you spoke to Mr. Stamatis,
10 and Mr. Stamatis recommended Mr. Salam to --

11 THE WITNESS: I believe that that's the way that that
12 worked because at the settlement conference, I don't believe
13 the declaratory judgment action had been filed yet, and we
14 could look at the record and get that clarified. I just don't
15 remember off the top of my head.

16 THE COURT: You know we had the attorney for the
17 insurance company here at that settlement conference.
18 Remember?

19 THE WITNESS: That's right.

20 THE COURT: Okay. So would that help you remember
21 whether or not there was a dec action pending?

22 THE WITNESS: I don't believe that there was a dec
23 action pending at that time.

24 THE COURT: Okay.

25 THE WITNESS: I mean, I don't remember that it was

1 pending at the time.

2 I do know that I did not know Mr. Salam.

3 THE COURT: Okay.

4 THE WITNESS: And my recollection is that I met him
5 through Mr. Stamatis.

6 THE COURT: Okay.

7 BY MR. von OHLEN:

8 Q. And I'm advised by co-counsel that that settlement
9 conference was in August of 2014.

10 Does that help reset the timeline in your mind?

11 A. As to?

12 Q. As to Mr. Stamatis's involvement in this case.

13 A. I did not contact him about the case until after that
14 settlement conference.

15 Q. Okay. And ballpark me: Is this days after that you come
16 to this realization that you need somebody else --

17 A. Yes.

18 Q. -- or is it months later?

19 A. Days.

20 Q. Days. Okay.

21 And you did say that you consulted with him on, I
22 believe, a potential lawyer in the DJ action; is that correct?

23 A. I asked -- I'm trying to think how it came up. I don't
24 recall necessarily about how it came up, whether I reached out
25 to him to get his recommendation or whether this was something

1 that occurred just in the course of us already working on the
2 case. As I said, it would be clarified if there was some
3 indication about when that dec action was actually filed.

4 Q. Okay. That will speak for itself, and that's in the
5 record.

6 And I think you also said that you solicited some
7 recommendations or information from Mr. Stamatis regarding
8 e-discovery issues; is that correct?

9 A. No.

10 Q. Okay. Tell me what -- I heard the word "e-discovery."

11 A. Correct.

12 Q. Okay. What about e-discovery did you solicit
13 Mr. Stamatis's input in?

14 A. If he had a recommendation for an e-discovery consultant.

15 Q. Oh, okay. And did he give you an answer?

16 A. Yes.

17 Q. Okay. Who was it?

18 A. Elijah.

19 Q. And Elijah, who became 4Discovery, correct?

20 A. Elijah was one company. I don't think of them as the
21 same. I didn't realize that they were --

22 Q. Related?

23 A. Are they related?

24 Q. That's my understanding, but you tell me.

25 A. I didn't understand that they were related.

1 Q. Okay.

2 A. I thought 4Discovery was different from Elijah.

3 Q. In any event, he recommended Elijah to you?

4 A. That's what I understand. The conversation was not

5 directly with me. It was with Ms. Liberman.

6 Q. Okay. So were you present when that conversation took

7 place?

8 A. No.

9 Q. Okay. So how do you know about the substance of that
10 communication between Ms. Liberman and Mr. Stamatis and what
11 they talked about?

12 A. I don't recollect how I know that.

13 Q. Okay. It is just in your head?

14 A. In my head, yes.

15 Q. Okay. Anything else that's in your head with regard to
16 what they might have talked about?

17 A. Who is "they"? I'm sorry.

18 MR. SMITH: Objection, your Honor.

19 THE COURT: Okay. What was the objection?

20 MR. SMITH: The objection is to the form and to the
21 foundation: "Anything else that's in your head that they
22 might have talked about."

23 THE COURT: I will sustain.

24 You can break that up.

25 And for the record, the settlement conference was on

1 August 25th. The dec action was filed on October 6th, 2014.

2 So if you could break that up, Mr. von Ohlen.

3 MR. von OHLEN: Okay.

4 BY MR. von OHLEN:

5 Q. You said that you have this knowledge about what

6 Mr. Stamatis and Ms. Liberman spoke about, that it's in your

7 head, but you don't know where it came from; is that correct?

8 A. I don't recollect how I came to that knowledge, no, but I

9 understand that it was her that contacted him for a

10 recommendation.

11 Q. Okay. And you don't know whether you heard that from

12 Ms. Liberman or Mr. Stamatis or somebody else; is that what

13 I'm getting?

14 A. I would be guessing if I told you who I --

15 Q. And I don't want you to guess, so just whatever your

16 answer is.

17 So do you know what else they might have talked

18 about, other than a recommendation on an e-discovery vendor?

19 MR. SMITH: Again, your Honor, just objection because

20 there is not even a time frame for this question.

21 THE COURT: Well, because the witness can't answer

22 it, so I will overrule.

23 So the question is "So do you know?" So it is a

24 foundational question. If he knows, then we can try to pin

25 down more foundation.

1 THE WITNESS: I don't know what they might have
2 talked about.

3 BY MR. von OHLEN:

4 Q. Okay. Getting back to Mr. Salam, did you keep him
5 apprised of developments in this case such as sending him
6 pleadings or phone call updates on status?

7 MR. LEONARD: Objection to relevance.

8 THE WITNESS: Do you have a time frame?

9 BY MR. von OHLEN:

10 Q. Yes, the time --

11 THE COURT: Hold on a second.

12 Objection to what?

13 MR. LEONARD: Relevance.

14 THE COURT: Overruled.

15 BY MR. von OHLEN:

16 Q. -- before he became counsel in this case?

17 A. Before he entered his appearance?

18 Q. Yes.

19 A. Okay. Ask me the question again. I'm sorry. I just
20 needed to understand the time frame.

21 Q. You knew that Mr. Salam was involved in the DJ, correct?

22 A. He was involved in the what?

23 Q. The declaratory judgment action.

24 A. I did not understand that, that he was -- that
25 Mr. Salam -- I'm sorry -- Mr. Stamatis or Mr. Salam?

1 Q. Mr. Salam.

2 A. Okay. Sorry, I was confused.

3 Q. Okay. And I'm trying to lay the foundation.

4 You knew that Mr. Salam was involved as counsel for
5 Brent Duke, your mutual client, in the declaratory judgment
6 action that actually involved the coverage for this case,
7 correct?

8 A. Correct.

9 Q. Okay. And so my question is, in the course of that, did
10 you keep Mr. Salam apprised of pleadings or the status of
11 discovery or in any way?

12 A. I thought that we did.

13 Q. And how did you do it?

14 A. Well, we would respond to any requests that he would have
15 for the needs of the defense of that lawsuit, and I think that
16 was principally the way that we would apprise him. I can't
17 describe that there was like a regular meeting or a regular
18 call or anything, but he did receive updates.

19 Q. And that's what I'm really getting at.

20 Did you copy -- let's take them one by one.

21 Did you copy him on pleadings?

22 A. I don't know that we copied him on every pleading, no.

23 Q. No, I'm not saying every pleading.

24 On any pleadings?

25 A. On any pleadings?

1 Q. Yes.

2 A. I'm sure we gave him some pleadings, yes.

3 Q. Okay. But you are not sure of the amount of the
4 pleadings?

5 A. I couldn't qualify that, no.

6 Q. Who would have made this decision to keep him in the loop
7 on what's going on in this case?

8 A. I don't know that it belonged to any particular person to
9 do that. As I said, my sense, as I sit here, was that we were
10 responding to what it is that he needed. He was updating us
11 on the developments in the case from his perspective, and we
12 would update him in a like manner.

13 Q. Okay. So it was a mutual exchange; is that what your
14 testimony is?

15 A. I think so, yes.

16 MR. von OHLEN: Okay. Can we please put up
17 Exhibit No. 54, please?

18 BY MR. von OHLEN:

19 Q. Now, I will represent to you that this is a privilege log
20 that your firm produced to us on June 6, 2018.

21 Do you recognize that privilege log?

22 A. I did not until I saw it as an exhibit.

23 Q. Okay. Well, do you have any reason to dispute that this
24 is a privilege log produced by your firm in this case?

25 A. I don't have any reason to dispute that.

1 Q. Okay. But have you ever seen this before?

2 A. As I said, I don't know that I saw it before. I saw it as
3 an exhibit.

4 Q. Who would have been in charge of putting together and
5 tendering a privilege log to opposing counsel in this case?

6 A. Mr. Life.

7 Q. Mr. Life.

8 So I will just ask you to -- let's scroll down to the
9 October 31st, 2014, and the November 10th, 2014, entries.
10 Let's see if we can find those.

11 I think one is at the bottom of this page.

12 Do you see that?

13 A. Yes.

14 Q. And it says --

15 MR. von OHLEN: Hold it. It is moving a lot here.

16 BY MR. von OHLEN:

17 Q. It says the Bates number of a document in the first
18 column.

19 The second number is the date: 10/31/2014.

20 The next column, it says "Receipt?"

21 Do you see that, where I'm talking about?

22 A. Yes, uh-huh.

23 Q. Okay. And the next column, it says the "to" and "from" is
24 from Kevin Salam, Esq., to Brent Duke.

25 And the next column describes the nature of the

1 communication, and that says: "Wire report regarding payment
2 for legal services."

3 And then the final column identifies the nature of
4 the privilege that's being asserted.

5 Are you with me on all of that, and did I state that
6 all correctly?

7 A. I see that, yes.

8 Q. Okay. Did I state anything incorrectly there?

9 A. No.

10 Q. Okay. So my question is: What are you referring to here
11 with regard to a wire report regarding payment for legal
12 services?

13 Did you have some type of financial arrangement with
14 Mr. Salam with regard to legal fees or payment for services in
15 this case?

16 MR. LEONARD: Objection, attorney-client, for the
17 reasons stated in the privilege log.

18 THE COURT: Overruled.

19 But I'm going to go back to your relevance objection.
20 I thought I knew where you were going, and I clearly was
21 wrong. So I'm not sure where all of this is going.

22 So go ahead and answer the question.

23 But help me get to wherever it is you are trying to
24 get to.

25 MR. von OHLEN: Okay.

1 THE WITNESS: The question again, please?

2 BY MR. von OHLEN:

3 Q. The last part of the question was simply framing this
4 particular receipt.

5 Did you have any arrangement with Mr. Salam regarding
6 any -- let me rephrase.

7 Did you have any financial arrangement with Mr. Salam
8 regarding legal fees with regard to this case?

9 A. No.

10 Q. Do you know during the course of Mr. Salam's
11 representation in the declaratory judgment action with Diamond
12 State whether he ever issued any instructions to Brent Duke
13 about retaining and preserving documents in connection with
14 this case?

15 MR. LEONARD: Objection to foundation and
16 attorney-client privilege, joint defense privilege.

17 THE COURT: Overruled.

18 He said, "Do you know?" It is a foundational
19 question, and it is clearly the subject matter of the motion.

20 Go ahead and answer.

21 THE WITNESS: I'm sorry. Restate it.

22 MR. von OHLEN: Did you not understand the question
23 or you just forgot it?

24 THE WITNESS: I forgot in the course of the
25 objections, so I want to make sure I'm answering it correctly.

1 BY MR. von OHLEN:

2 Q. Okay. So the question is: Do you know, as a result of
3 Mr. Salam being involved in what I will call a "sister case,"
4 a related case, do you know if he ever issued any instructions
5 of any kind to Mr. Duke, your mutual client, regarding
6 preserving data?

7 A. I do not know that.

8 Q. Okay. Do you know what the term "Peppers counsel" means
9 under Illinois law?

10 A. I have a general understanding of what it means, yes.

11 Q. Just give me your general understanding.

12 MR. LEONARD: Objection to the relevance and calls
13 for a legal conclusion.

14 THE COURT: Well, I'm getting a little confused on
15 the relevance.

16 So I will overrule it for now.

17 Legal conclusion, he is a lawyer. He is telling us
18 what his understanding of Peppers counsel is.

19 So overruled to that extent.

20 THE WITNESS: My understanding is that under
21 circumstances where an insurance company agrees to defend
22 under a reservation of rights that the insured is entitled to
23 engage counsel of their selection rather than under
24 circumstances where there is an agreement to defend when the
25 insurance company then selects the counsel.

1 BY MR. von OHLEN:

2 Q. Okay. And is your firm Peppers counsel in this case?

3 A. It was, yes.

4 Q. Okay. I mean, until you withdrew?

5 A. Correct.

6 Q. Okay. So at all times prior to that, was your firm

7 Peppers counsel in this case?

8 A. I don't know -- well, I believe so, yes, yes.

9 Q. And then as a result of that, Diamond State would have
10 paid your fees, correct?

11 A. Yes.

12 Q. Okay. Now, in May of 2013, you filed a counterclaim on
13 behalf of your clients, Brent Duke and 21 Century Smoking,
14 correct?

15 A. Whatever the record reflects. I don't have an independent
16 recollection.

17 Q. I will represent to you that that's in the docket.

18 A. Okay.

19 Q. That that's the date which -- you recall filing a
20 counterclaim, right?

21 A. Yes.

22 Q. Okay. And that was in May of 2013.

23 And in that counterclaim, you sought, you know,
24 various damages against DR, including trademark infringement
25 and whatever else, Illinois Deceptive Trade Practices Act.

1 Do you remember all that?

2 A. Yes.

3 Q. Okay. Did there ever come a time where Diamond State
4 asked you to allocate or separate the billing for prosecuting
5 the counterclaim versus defending Mr. Duke or 21 Century
6 Smoking in this matter?

7 MR. SMITH: Objection, your Honor.

8 MR. LEONARD: Objection to relevance.

9 MR. SMITH: Same objection.

10 THE COURT: Yes, I don't know the relevance. If you
11 want to make a proffer?

12 MR. von OHLEN: Can I make a proffer on the
13 relevance?

14 THE COURT: You can make a proffer.

15 MR. von OHLEN: The issue in this case -- and we have
16 had literally hours of testimony on the intent: "My intent
17 was not to do this; my intent to do that." As your Honor
18 knows, intent is done by connecting dots. No one is going to
19 stand up here and have a Perry Mason moment and say, "Yeah, I
20 intended to do that." One of the things that you can
21 establish intent with is -- the oldest one in the book is
22 money, and this goes exactly to that.

23 MR. SMITH: Your Honor, if I may respond, there is a
24 much more direct way to get at that, I think.

25 THE COURT: Yes, but it is his case to try.

1 But I'm still not -- you lost me on that.

2 MR. von OHLEN: I guess I would sum it up by the
3 financial incentives that a Peppers counsel has to --

4 THE COURT: Drag a case on forever. Got it. I
5 understand that. I'm with you there. But tie that into the
6 motion.

7 MR. von OHLEN: Then, your Honor, I have made the
8 point, and I will move on.

9 THE COURT: All right. I got that. It's in my head.
10 I just didn't understand how it worked into the motion. Okay.

11 MR. von OHLEN: Sorry.

12 BY MR. von OHLEN:

13 Q. Did you have occasion to represent other clients in
14 federal court between 2006 and 2012?

15 A. Between 2006, you said?

16 Q. 2006 and 2012, in federal court litigation.

17 A. Yes.

18 Q. Okay. And did you have experience, prior to your
19 retention in this case, regarding the rules and procedures
20 regarding the preservation of electronically stored
21 information?

22 A. Yes.

23 Q. And we have heard a lot about the phrase "litigation hold
24 letter" before. What is your understanding of what a
25 litigation hold letter is?

1 A. A litigation hold letter is, essentially, a -- not a
2 demand, but a notice given to the client to ensure
3 preservation of their evidence, of their data.

4 Q. To inform them of their obligations under the rules and
5 what they need to do, correct?

6 A. Yes.

7 Q. Okay. And have you ever issued a litigation hold letter
8 to any other client before this case?

9 A. I don't believe so.

10 Q. And we can now agree that you didn't issue a litigation
11 hold letter in this case at any time, correct?

12 A. There was nothing put in writing.

13 Q. Well, that's what I mean.

14 A. There was a litigation hold issued, yes.

15 Q. That's not my question. Let's just stick with the exact
16 question, all right?

17 You never issued a litigation hold letter, not an
18 oral instruction, a letter in this case, correct?

19 A. Correct.

20 Q. And you never issued one ever before in your practice; is
21 that correct?

22 A. I don't recollect that I have.

23 Q. Okay. To your knowledge, did anyone at either
24 Mr. Stamatis's firm or Mr. Shonder's firm ever issue a
25 litigation hold letter in this case?

1 A. I have to take a step back.

2 I did send a letter, maybe a year ago, to -- not to a
3 client, but to Facebook to preserve some evidence, but --

4 Q. Okay. So other than that, your testimony is accurate?

5 A. Yes, I don't know that I had issued a letter to a client.
6 I mean, I may have. I'm just telling you I don't recollect
7 it.

8 Q. All you can give me is your best recollection. That's
9 fine.

10 A. That's right.

11 Q. Okay. Do you have a file at your firm where you keep the
12 correspondence related to this case before you withdrew?

13 A. Well, it's not in one file necessarily. We have
14 correspondence. We keep that, but we don't keep it
15 necessarily in a single file.

16 Q. Okay.

17 A. All correspondence doesn't go into one file.

18 Q. It might be spread out across the office?

19 A. Yes.

20 Q. Okay. But there is an organizational concept behind
21 retaining correspondence for this case; is that a fair
22 statement?

23 A. Yes.

24 Q. Okay. When you brought Mr. Stamatis on board as a member
25 of the defense team, whenever that might be, and whatever you

1 might consider, but certainly he filed his appearance in June
2 of 2015, and fact discovery was still open in June of 2015.

3 Did you give Mr. Stamatis access to the entire file?

4 A. I'm not sure how to answer that.

5 Q. I don't want to tell you how to answer it, but, generally
6 speaking, what we tell witnesses is it is a yes, no, or I
7 don't know.

8 A. Well, the reason why I don't know how to answer it is
9 because he was not prevented from seeing anything.

10 THE COURT: But the question is did you give him
11 access? Did you say "Here's the file"?

12 THE WITNESS: Yes, he had access, if he wanted to, to
13 see the file. He did ask for documents from us, and we did
14 provide them when he would ask for them. So that's my best
15 answer.

16 BY MR. von OHLEN:

17 Q. Okay. And just so that I understand it, he had -- you
18 know, obviously, during regular business hours, he had
19 complete access to the file, correct?

20 A. We didn't deny him access.

21 Q. Okay. Do you know whether or not he read the file?

22 A. Oh, he did. I don't know if he read the entire file, but
23 he read the material that we did provide.

24 Q. Okay. Did you choose the material that you provided, or
25 did you give him access and he decided what to read?

1 A. I don't remember that kind of distinction.

2 Q. Okay. Do you remember any kind of time when Mr. Stamatis
3 showed up at your office to read the file?

4 A. He may have. I don't know for sure.

5 Q. Who would know?

6 A. Well, maybe myself, maybe Mr. Life, maybe
7 Ms. Liberman -- actually, no, not Ms. Liberman because she was
8 gone by then.

9 But I can't say -- it strikes me that it could have
10 happened that he came by the office out of convenience to be
11 able to take a look. He certainly came by to see what kind of
12 documentation that we had for purposes of getting some sense
13 of the status on the case.

14 Q. Okay. And let's put a time on that.

15 So he files his appearance in June of 2015. Did he
16 look at the file before he filed his appearance or after he
17 filed his appearance?

18 A. He looked at -- he certainly looked at file material prior
19 to his appearance. I can't tell you that I know the extent of
20 what he looked at.

21 Q. Okay. And can you put any kind of time frame on when he
22 would have been looking at the file, other than it was after
23 the settlement conference and before he filed his appearance?

24 Let's start with can we agree that it was in that
25 time frame?

1 A. Within that time frame what?

2 Q. Starting with the settlement conference, when you decided
3 you needed to bring somebody else on board, and when we know
4 that he filed his appearance in the middle of June 2015.

5 So between those two things, can you put a time frame
6 on when Mr. Stamatis -- when you gave him access to the file?

7 A. It probably would have been starting in 2015 because, as I
8 said, he was more in the role of just consulting with us prior
9 to that time. We did provide pleadings to him so that he was
10 familiar with the case, but as far as his actually coming over
11 and reviewing the file, I don't know that that would have
12 happened prior to, say, January of 2015.

13 Q. January of 2015?

14 A. Again, you are asking me to put a date on it, and that's
15 the best that I can do. I don't know whether that's correct
16 or not.

17 Q. Okay. Well, fair enough.

18 So if I understand your testimony earlier, at some
19 point, at least, it is your position that you were no longer
20 lead counsel; is that correct?

21 A. Yes.

22 Q. Okay. And who was it that became lead counsel?

23 A. Mr. Stamatis.

24 Q. And when would that have been, as of what date?

25 A. I can't put a precise date on it, but I know that we had

1 the conversation a couple times.

2 Q. And you can't put any date on it?

3 I'm not asking for precision here. I'm asking your
4 best estimate as to the date when you say you were no longer
5 lead counsel and you were handing over the reigns to
6 Mr. Stamatis.

7 A. I would say it would be sometime in 2017. It wasn't 2015
8 because that's when he first became involved. He took the
9 principal role of dealing with our experts, which involved
10 2015 and into 2016, I know. But I remember conversations with
11 him saying, "You need to be the lead on this, and I don't want
12 to have a circumstance where there is something where there is
13 a misunderstanding as far as something being done as between
14 us," and he acknowledged that, but I don't have an exact date
15 on when that occurred.

16 Q. Okay. But it sounds like we are moving. It was
17 certainly -- I'm not going to say "certainly."

18 It was after he filed his appearance, and you believe
19 sometime in 2017.

20 Was that your testimony?

21 A. Yes, just, you know, trying to give as best a time. There
22 wasn't a precise moment, the responsibilities between the two
23 of us as counsel on the case, but at a certain -- he was
24 brought in because he was going to be doing the trial, and
25 there were things that he needed to be -- that I needed to

1 make sure were being handled with respect to the experts and
2 others, with having to try this in mind.

3 Q. Okay.

4 A. So --

5 Q. I'm sorry. I didn't mean to interrupt you.

6 A. No, I'm done.

7 Q. Okay. Now, you remember expert discovery because I was
8 involved with expert discovery, and we sat across from each
9 other at all the expert depositions.

10 Do you recollect that?

11 A. I do.

12 Q. Okay. And all those dates will speak for themselves.

13 So when we were across from each other, and I was
14 asking questions of your expert, and you or Mr. Stamatis was
15 asking questions of our expert, who was lead counsel in your
16 mind at that point?

17 MR. SMITH: Objection. There is a lack of time
18 frame, again, in the question.

19 THE COURT: He just said during expert discovery, so
20 overruled.

21 THE WITNESS: I don't know that I could say that one
22 of us was lead counsel. Mr. Stamatis, though, I interpreted
23 his role as being principally the attorney that was dealing
24 with our experts in terms of getting their opinions and
25 handling the depositions.

1 I don't recall on all the defense of those
2 depositions. I think we can look and see who it was that was
3 defending those. But I saw him as playing the lead role with
4 respect to those defendants. I wouldn't say necessarily that
5 as between the two of us, who was the lead attorney in the
6 case overall, but that did become the case, I would say, if I
7 have to put a time on it, sometime maybe in '17, 2017.

8 Q. As we are sitting here today, are you aware of whether
9 Mr. Stamatis had an understanding that he was lead counsel in
10 this case at any time?

11 A. He acknowledged it when we had the conversation. We had
12 the conversation, I know, a couple times.

13 Q. Okay. And I hate to keep on coming back to when those
14 conversations occurred, but is that, again, sometime in 2017?

15 A. It's as best I can put some kind of date on it, yes.

16 Q. Okay. And was there ever any writing where you said,
17 "Hey, you are now lead counsel," or "We are co-lead counsel,"
18 or "We are switching roles"?

19 Is there anything to that effect in your file?

20 A. I don't think so.

21 Q. Okay. Did you ever restrict Mr. Stamatis's access to
22 Mr. Duke or any 21 Century people in any way?

23 A. To any 21 Century people? No.

24 Q. No?

25 A. Or Mr. Duke? No.

1 Q. Okay. Who decided to bring Mr. Shonder on board?

2 A. Mr. Shonder works with Mr. Stamatis.

3 Q. All I can note is they seem to have different law firms.

4 Is it your understanding that they have some kind of
5 arrangement where they work together?

6 A. Yes.

7 Q. Okay. So, again, my question is: Who decided to bring
8 Mr. Shonder on board?

9 A. I think that it was probably a mutual decision. I don't
10 remember that there was much discussion about it. It was
11 somebody that works with Mr. Stamatis on his matters.

12 I met Mr. Shonder at the time that I met face-to-face
13 with Mr. Stamatis about his trademark action. They were
14 handling that together, and that's how I met the two of them.

15 Q. Okay. When you say it was a mutual decision, is it my
16 understanding that it was a mutual decision between you and
17 Mr. Stamatis to bring Mr. Shonder on board as additional
18 counsel?

19 A. I don't remember that there was any particular decision,
20 other than Mr. Shonder is there, this is what Mr. Shonder
21 does, and he works with Mr. Stamatis. So that's -- it's like
22 although they are not a firm or a partnership, as I understand
23 it, they operate very much that way, and that's how I
24 perceived it. I'm getting Mr. Stamatis, and I'm getting
25 Mr. Shonder along with it.

1 Q. Okay. So did you have any involvement on making the
2 decision to bring him on board?

3 A. I guess, yes.

4 Q. You were told, and you said, "It is okay with me,"
5 something like that?

6 A. Yes, that's fine. Yes, he is somebody who works with
7 Mr. Stamatis and has very good skills in terms of briefing and
8 trial work.

9 Q. Okay. We are going to switch topics here. So take a
10 breath, take a drink.

11 All right. As you know, this case was filed in
12 September 2012, and fact discovery closed on July 1st, 2015.

13 You would agree with that, right?

14 A. Yes.

15 Q. Okay. And during that whole time frame, from September
16 2012, your first meeting with Brent Duke, until the time when
17 discovery closed, did you ever personally inquire of Brent
18 Duke of the identity of all of his e-mail accounts?

19 A. I think we discussed that initially, yes.

20 Q. Okay. When you say "we," I want to be real careful.

21 Did you -- I'm just asking you, not anybody else in
22 your firm -- did you have discussions with Mr. Duke regarding
23 the identity of all his e-mail accounts?

24 A. Yes, that was something that occurred in the beginning.

25 Q. Okay. And when would that have been?

1 A. It would have been in the fall of 2012.

2 Q. Did you take any notes or memoranda that memorializes the
3 information that Mr. Duke gave you at those meetings regarding
4 his e-mail accounts?

5 A. I don't think that I have any notes.

6 Q. Well, you know, as a lawyer, what my next question is
7 going to be, right?

8 You don't think you have any notes. Have you gone
9 back and looked to see if you had any notes regarding e-mail
10 accounts?

11 A. I haven't seen any notes.

12 Q. Okay. And if you did have notes, presumably, they would
13 be in your file, correct?

14 A. Yes.

15 Q. And have you retained a copy of your file after
16 withdrawing in this case?

17 A. You mean -- do you mean files, plural?

18 Q. I didn't think I needed to define this, but, I mean,
19 lawyers have case files where they keep everything related to
20 the case. You have an understanding about that, right?

21 A. Yes. So my question was I heard you to say a singular
22 file.

23 Q. No, your whole file, your Brent Duke, DR v. 21 Century,
24 your whole file.

25 Did you keep a copy of your file after withdrawing in

1 the beginning of June 2019?

2 A. Yes.

3 Q. Okay. So if you had any notes, they would be in that
4 file, right?

5 A. Yes.

6 Q. Okay. And, again, these questions, when I say "you," I am
7 only meaning you. So I'm giving you a heads up here, okay?

8 Did you obtain the login information associated with
9 those e-mail accounts at any time between 2012, when the case
10 was filed, and the close of discovery on July 1st, 2015?

11 A. I don't think I ever did, no.

12 Q. Okay. Do you know if anyone else at your firm obtained
13 the login information from Mr. Duke regarding his e-mail
14 accounts during that time frame?

15 A. I don't know.

16 Q. Okay. Do you recall Mr. Duke's testimony from last week
17 where he said that he offered his login information to his
18 attorneys on many occasions?

19 Do you recall that testimony?

20 A. I do.

21 Q. Okay. Is that truthful testimony?

22 A. I don't understand it that way.

23 Q. I'm not even sure I understand the answer.

24 Is it truthful testimony to the best of your
25 knowledge?

1 A. I only recall seeing an offer sometime in May of last
2 year, perhaps. I don't recall ever seeing anything before
3 that time.

4 Q. Okay. And that would be outside the time frame.
5 Remember, I'm bringing you back just to that time frame.

6 So within that time frame, you are saying that he did
7 not offer his login information to the best of your knowledge?

8 A. To the best of my knowledge, he did not.

9 THE COURT: And the time frame is 2012 through
10 July 1st of 2015, correct?

11 MR. von OHLEN: Correct.

12 THE COURT: That's what I thought. Okay. I just
13 wanted to confirm. Thank you.

14 MR. von OHLEN: Okay.

15 BY MR. von OHLEN:

16 Q. So your understanding is that if Mr. Duke testified to
17 that, that's not correct?

18 MR. SMITH: Objection. Objection, misstates
19 Mr. Duke's testimony.

20 THE COURT: Well, it's overruled.

21 The question is: "So your understanding is that if
22 Mr. Duke testified to that, that's not correct?"

23 So you can go ahead and answer that.

24 Objection overruled.

25 THE WITNESS: If his testimony is that he offered me

1 his login information during that period of time?

2 MR. von OHLEN: Well, actually, the initial question
3 was whether or not he offered -- let's start again because I
4 really do want to get this right. I don't want to waste the
5 court's time, but I want to get it right.

6 BY MR. von OHLEN:

7 Q. Do you recall Mr. Duke's testimony that he said here in
8 open court that he offered his lawyers login information on
9 many occasions?

10 Do you recall that testimony?

11 A. Yes.

12 Q. Okay. So now my question is: Within the time frame of
13 September 2012, when you first met him, and when discovery
14 closed in this matter on July 1st, 2015, do you have any
15 knowledge that Mr. Duke actually tendered that login
16 information on his e-mail accounts to any lawyer at your firm?

17 A. I don't have any of that knowledge, no.

18 Q. Okay. And I think you did state that Mr. Duke did offer
19 his login information to Travis Life, and I believe it's in an
20 e-mail dated May 7th, 2018.

21 Do you remember that testimony?

22 A. Yes.

23 Q. Okay. And do you know whether or not that was the first
24 time that Mr. Duke offered his login information for his
25 e-mail accounts?

1 A. I don't know if the -- if he ever did.

2 Q. If you don't know, who else would know at your firm or
3 anybody on the defense team?

4 A. Well, I mean, it would be anybody else on the defense
5 team, if he did. I'm only speculating.

6 Q. Okay. All right. So you can only speak to yourself and
7 the knowledge that you have attained as a result of being the
8 guy with gray hair on the file?

9 A. I guess, yes.

10 Q. Okay. Did Mr. Duke ever advise you that he had -- well,
11 let's go back foundationally.

12 What e-mail accounts did Mr. Duke advise you that he
13 had during that time frame?

14 I don't want to repeat it 10,000 times. You know the
15 time frame I'm talking about, right, from filing to fact
16 discovery closure?

17 A. Correct, right.

18 Q. What e-mail accounts did he tell you he had?

19 A. He had the Yahoo! account, and he had the bduke@21century,
20 and the support@21century.

21 Q. Okay. Just for ease of us going back and forth, can we
22 agree that we are going to call one the Yahoo! account and the
23 other the GoDaddy accounts?

24 Is that okay with you?

25 A. Yes.

1 Q. Okay. Did Mr. Duke ever advise you that he had a Gmail
2 account?

3 A. No.

4 MR. von OHLEN: If you can put up LS Exhibits 14 and
5 15 for Mr. Leavens.

6 There we go.

7 We will start with 14.

8 BY MR. von OHLEN:

9 Q. Okay. I will represent to you that these were produced by
10 your lawyers to us in this case. So I'm just trying to lay a
11 foundation here. Your lawyers produced these documents.

12 Can you tell me what this document is?

13 A. They appear to be notes that were taken by Ms. Liberman
14 based on a conversation that she had with Mr. Duke.

15 Q. And how do you know that?

16 A. Well, it says, "Conference with Brent Duke," and I believe
17 that Ms. Liberman has identified that as her handwriting.

18 Q. Okay. And you worked with Ms. Liberman, presumably, for a
19 period of years, correct?

20 A. Yes.

21 Q. And you had occasion to see her handwriting, correct?

22 A. I did.

23 Q. Okay. And you believe these to be her notes from that
24 meeting?

25 A. I wouldn't have been able to tell you on that basis, no.

1 Q. So you are a trial lawyer. Can you lay a foundation for
2 these documents? They are produced by your lawyers in this
3 case. They came out of your file, correct?

4 A. Correct.

5 Q. Okay. And you believe these to be Ms. Liberman's notes;
6 is that correct?

7 A. I do.

8 Q. Okay. And what about the next page, which is LS-15, can
9 you tell the court what that is?

10 A. Well, it's a list of questions with some comment, and it's
11 on a notepad that says: "From the Desk of Heather Liberman."
12 It appears to be the same handwriting.

13 Q. Okay. And those came out of your firm's file in this
14 case, correct?

15 A. Yes.

16 Q. Okay. Let's go back to 14.

17 Now, you would agree with me that at the top of this
18 document, it is dated May 29, 2014, and it's titled:
19 "Conference with Brent Duke"; is that correct?

20 A. Yes.

21 Q. Okay. Were you present at that conference?

22 A. No.

23 Q. Okay. Do you know who else was present at that
24 conference?

25 A. I have no idea who, other than Mr. Duke and Ms. Liberman.

1 Q. Okay. Do you know where that conference took place?

2 A. No.

3 Q. Do you know who arranged the meeting or what the purpose
4 of the meeting was?

5 A. No.

6 Q. Who would have the answers to those questions?

7 A. Mr. Duke and Ms. Liberman --

8 Q. Okay.

9 A. -- I would assume.

10 Q. Do you know if there are any other notes that evolved from
11 this particular conference with Brent Duke other than LS-14
12 and LS-15?

13 A. Not that I know of.

14 Q. Okay. Did Ms. -- well, let's lay some foundation.

15 Didn't Ms. Liberman work for you?

16 A. She worked for our firm, yes.

17 Q. She was an associate at your firm, right?

18 A. Yes.

19 Q. And you were the first named partner on the door, correct?

20 A. Correct.

21 Q. Okay. How long did she work for you before she left?

22 A. She started as a clerk and then became an associate. She
23 was with us maybe four years.

24 Q. And she would have left at the end of 2014?

25 A. Correct.

1 Q. Okay. So was she a four-year attorney or did you hire her
2 as a lateral?

3 THE COURT: Or did she go from a law clerk into an
4 associate role?

5 THE WITNESS: She started as a law clerk and then we
6 elevated her.

7 BY MR. von OHLEN:

8 Q. Okay. So she transitioned right from law clerk?

9 A. Yes.

10 Q. So she was -- essentially, by the time she left, she was a
11 four-year lawyer, correct?

12 A. By the time she left what?

13 Q. By the time she left your firm, she had been a lawyer for
14 four years?

15 A. Three, maybe.

16 Q. Okay. Three or four?

17 A. She was still in law school when she started with us, I
18 believe.

19 Q. Okay. Did Ms. Liberman communicate with you in any manner
20 with regard to what transpired at this conference with Brent
21 Duke on May 29th, 2014?

22 A. I'm sorry. Do that again.

23 Q. Sure.

24 Did Ms. Liberman communicate with you in any manner
25 about what transpired at this conference with Brent Duke on

1 May 29th, 2014?

2 A. You mean did she report after? Is that what you are
3 asking?

4 Q. Yes, I mean, come back and tell you what happened.

5 A. I don't have a specific recollection of it. It would be
6 her practice to do that, but I don't have a specific
7 recollection.

8 Q. Okay. To report back what happened. You are the senior
9 guy, presumably, on the case, and she's the junior associate,
10 correct?

11 A. Yes.

12 Q. Okay. But you don't have any recollection of what she
13 said?

14 A. I don't have a specific recollection of a discussion about
15 this afterwards. As I said, it would be her practice, but I
16 don't remember the specifics of it.

17 Q. Well, let's take a wide view. If you don't have any
18 recollection of the specifics, do you have any recollection at
19 all with regard to what she said?

20 A. About the conference that she had with Mr. Duke?

21 Q. Exactly.

22 A. No, I don't.

23 Q. Okay. So as we are sitting here today, are you even sure
24 that she came back and talked to you, other than it's her
25 regular practice?

1 A. I assume that's what she did, yes, because that is how she
2 operated. She was very good at communication.

3 Q. Okay. Do you recall what direction, if any, that you gave
4 her as a result of her communicating about what occurred at
5 the conference with Brent Duke?

6 A. No.

7 Q. Would it be your practice to give somebody some direction
8 after they come back from a conference with a client like
9 this?

10 A. If there was some action necessary, I would have indicated
11 that, yes.

12 Q. Okay. And I'm doing this to try to refresh your
13 recollection.

14 Let's assume that Ms. Liberman did come to you,
15 consistent with her practice, and let's assume that she spoke
16 to you about what's exactly in her notes.

17 Does that refresh your recollection about what you
18 might have -- what kind of guidance you might have given her?

19 MR. LEONARD: Objection to the hypothetical and
20 objection to improper refreshing of recollection.

21 THE COURT: Well, it is a hypothetical. I will allow
22 it.

23 If you can answer that.

24 There is two parts to that hypo. You don't recall
25 her coming back, you don't recall a conversation, but you said

1 that's her practice, and if that was her practice, what would
2 you have done?

3 THE WITNESS: Hypothetically, what would I have
4 advised her to do? That's what you are asking?

5 MR. von OHLEN: Yes.

6 BY MR. von OHLEN:

7 Q. I'm saying this is the best piece of evidence we have at
8 the moment.

9 THE COURT: Let's do this: What's your practice?
10 Heather Liberman comes up to you after she meets with
11 clients, right? That's her practice; is that true?

12 THE WITNESS: Yes.

13 THE COURT: And then you have a conference with her,
14 right?

15 THE WITNESS: Yes.

16 THE COURT: And what's your practice after you have a
17 conference with an associate who talks with one of your
18 clients?

19 THE WITNESS: It would depend upon what the
20 circumstances were, what the conference was about, and if
21 there was any action that was going to be necessary for
22 follow-up. So it's really impossible for me to say in a
23 hypothetical that this is like the routine way in which
24 something might be handled.

25

1 BY MR. von OHLEN:

2 Q. And I'm trying to take it out of the hypothetical by
3 saying you have here her notes. The assumption is that she
4 came to you and talked about these topics. I'm not saying she
5 did. But I'm saying if she talked to you about these very
6 topics, and I don't want to have to go through them line by
7 line, but you have them right in front of you --

8 MR. LEONARD: Objection.

9 THE COURT: Let him finish the question.

10 We are going to take a break.

11 If you can't figure that one out after 15 times, I
12 don't know what.

13 (Recess taken.)

14 THE COURT: There is two people sitting in the jury
15 box. They are both my clerks. They are not jurors. We don't
16 have a jury here. There is not going to be a juror unschooled
17 in law that is going to hear horrifically prejudicial
18 testimony that will be unable to be removed from their head
19 absent a lobotomy.

20 So, again, I'm pretty sure I have said this every
21 day, and this is also for the benefit of my court reporter,
22 who has trouble taking down two people talking at once, let
23 alone three people talking at once.

24 Let the question come through. Stand up, make an
25 objection. The witness will hold off. All the witnesses are

1 here. The witness will hold off when there is an objection.

2 I will make a ruling. And then we will get an answer.

3 I don't think I have jammed somebody up by saying,
4 "Well, the witness has answered. Too late, I'm not going to
5 listen to your objection." I have heard the objections.

6 So, once again, let the question come through. Stand
7 up, make an objection. The witness will hold off. I will
8 rule on the objection. And we will have a nice, clean
9 transcript, okay?

10 Is there any confusion as to that?

11 I didn't think so. Okay.

12 Do you need your question read back, or do you want
13 to start with another one, Mr. von Ohlen?

14 MR. von OHLEN: I can't remember the last question.

15 THE COURT: Okay. Why don't you read it back,
16 Heather.

17 THE REPORTER: Sure.

18 (Record read.)

19 THE COURT: All right. So, again, Mr. Leavens, we
20 are trying to figure out what these notes are.

21 Theoretically, we can get Ms. Liberman in here, and
22 then call you back to testify about these notes. If you
23 don't -- you know, if you can't answer a question, you can't
24 answer a question.

25 We are trying to figure out what happened after this

1 meeting. If you can recall, you can testify to it. Go ahead.
2 If you can't, you can't, and then we will see what
3 Ms. Liberman says.

4 But you have testified that her general practice was
5 to talk to you after meeting with a client. I tried to follow
6 up with what's your practice after your associate talks to one
7 of your clients. You said it would depend on the
8 circumstances. Mr. von Ohlen says, "Well, you have the
9 circumstances sitting right in front of you. What would be
10 your practice?"

11 So having had the opportunity to review a document
12 that's in front of you, that's been produced in this case,
13 that's a document from your own firm, subject matter relating
14 to this case, do you know what, if anything, you said to
15 Ms. Liberman after she met with you, if she did meet with you;
16 and if so, what was it?

17 THE WITNESS: I don't have any recollection of a
18 conversation with her, giving her instructions to do anything
19 based upon what's set out here.

20 MR. von OHLEN: Okay. Thank you.

21 BY MR. von OHLEN:

22 Q. Did you ever inquire of Mr. Duke the identity of his
23 employees, either current or former, spanning the arc of the
24 allegations in this case, meaning from 2009 to the close of
25 discovery in 2015?

1 Did you ever inquire of Mr. Duke of the identity of
2 those people and obtain their login information for their
3 e-mail accounts?

4 A. No.

5 Q. Okay. Do you know if anyone at your firm or on the
6 defense team did that?

7 A. No, I don't know.

8 Q. Okay. Now, I'm going to give you some names, and these
9 names are from your disclosures -- your Rule 26 disclosures in
10 this case. So that's where I sourced these names.

11 Are you with me on that?

12 A. Yes.

13 Q. Okay. So it is Robert Hough, H-o-u-g-h; Bryan Kos, K-o-s;
14 Steve Spraker; Rob Link; Brandon Duke; and Laurie Duke.

15 Okay. You made several disclosures in this case, and
16 one or many of them, all of those names, I'm making that
17 representation to you.

18 Okay? Are you with me?

19 A. Yes.

20 Q. Okay. Did you ever attempt to contact these potential
21 custodians to inquire whether there were any potential sources
22 of ESI such as personal e-mail accounts, cell phone texting
23 accounts, or any other kind of accounts that they used for
24 business purposes while associated with 21 Century Smoking?

25 A. I don't recall that we were told that everything was on X

1 number of computers. Three or four computers initially became
2 four.

3 Q. I hear your answer, but that wasn't my question.

4 My question -- it was a long question, so I'm just
5 going to do the front part of the question again.

6 Did you ever attempt to contact those potential
7 custodians to inquire of them regarding potential sources of
8 ESI?

9 A. We contacted some of those people who were going to be
10 deponents about documents that they might have.

11 But your question with respect to when you say "ESI,"
12 what are you referring to?

13 Q. Let me help you out, and I apologize for that.

14 You are not familiar with the term "ESI"?

15 A. Well, I am, but are you referring to -- what, to e-mail?
16 Are you talking about documents stored?

17 Q. Go ahead, sir, finish your --

18 A. I was trying to get some clarification about what kind of
19 ESI that you were talking about.

20 Q. Fair enough. I had it in my initial question. So let me
21 bring it all back to you.

22 Do you want me to put it all together again so you
23 have it?

24 THE COURT: I think you are going to have to break
25 this out.

1 Did you talk about -- did you contact Bob Hough about
2 these potential documents?

3 MR. von OHLEN: Let's start with ESI.

4 BY MR. von OHLEN:

5 Q. Do you understand that "ESI" means electronically stored
6 information?

7 You understand that, right?

8 A. I do, and there are various kinds of ESI.

9 Q. Correct.

10 There is e-mail, there is cell phone that has got
11 texts on it, there is social media that people write stuff
12 back and forth with each other, there is chat, right?

13 All those things are ESI? You have that
14 understanding, right?

15 A. Yes.

16 Q. Okay. And you have an understanding of all the people who
17 you disclosed in your Rule 26 disclosures and supplemental
18 disclosures. I'm not going to go over their names again.

19 A. Yes.

20 Q. We just talked about them, right?

21 A. Right.

22 Q. Okay. So keeping in mind those names and electronically
23 stored information, which we just discussed, those topics,
24 e-mails, phone texting, social media accounts, did you ever
25 attempt to contact those potential custodians, the people that

1 you put on your Rule 26 disclosures, in order to determine
2 whether or not that they had any kind of ESI, any kind of
3 device, any kind of service that they may have used for
4 business purposes with 21 Century Smoking?

5 A. I think Mr. Hough. I can't say as to the others.

6 Q. Okay. And when you say you think Mr. Hough, did you do
7 it, or did somebody else do it?

8 A. I remember meeting with Mr. Hough. So I'm sure that came
9 up in conversation with my meeting with him.

10 Q. Are you assuming or do you know?

11 A. I'm assuming based upon the fact that this was -- he was a
12 deponent, and I wanted to understand what it is that he had in
13 terms of data, documentation.

14 Q. Okay. So I don't want to put words in your mouth, but
15 your testimony is you did inquire of Mr. Hough regarding
16 potential sources of ESI that might relate to this case; is
17 that your testimony?

18 A. My testimony is I believe I did, yes, in connection with
19 his being a deponent in this case.

20 Q. Okay. And when would that have been?

21 A. Prior to his deposition. I don't remember a specific
22 date.

23 Q. What did he tell you?

24 A. I don't recall.

25 Q. Did you take any notes?

1 A. I don't believe so.

2 Q. Other than Mr. Hough, all the other names that I
3 mentioned, did you contact any of them regarding potential
4 sources of ESI?

5 A. No.

6 THE COURT: When you talked to Hough, did he tell you
7 that he did not use his 21 Century Smoking e-mail account?

8 THE WITNESS: I don't remember. As I said, I have a
9 general understanding that would have been something that I
10 would have talked to him about, but I don't remember the
11 specifics.

12 BY MR. von OHLEN:

13 Q. Well, that was the next question in my outline that the
14 Judge just asked.

15 So we heard Mr. Duke testify that Mr. Hough used his
16 @live.com account for business e-mails with Mr. Duke.

17 Do you remember that testimony?

18 A. I believe so, yes.

19 Q. Okay. So did you ever inquire of either
20 Mr. Hough -- let's start with Mr. Hough.

21 Did you ever inquire of Mr. Hough regarding how he
22 communicated with Brent Duke for business purposes?

23 A. I don't remember that -- I don't remember the specifics of
24 my conversation with him.

25 Q. Okay. So let's switch it around.

1 Did you ever speak with Brent Duke about how he
2 communicated with Mr. Hough regarding business purposes, other
3 than orally?

4 A. I don't remember that specific topic.

5 Q. Do you know whether you have any notes about any of those
6 topics?

7 A. Which topics? I'm sorry.

8 Q. The topics about Mr. Hough and how you may have reached
9 out to him, but you are not sure.

10 A. Well, I know I met with him.

11 Q. Okay. About the @live.com, do you have any notes
12 regarding that?

13 A. @live?

14 Q. Yes, that's what we just talked about a minute ago,
15 that -- do you recall that, the testimony from Brent Duke
16 where he said, "Robert Hough communicated with me through
17 @live.com because he didn't want to use" --

18 A. I'm not familiar with that, no.

19 Q. Okay. You weren't here when Mr. Duke testified --

20 A. No, I'm not familiar with @live.

21 Q. Oh, okay. All right. Thank you.

22 All right. Let's just put up two other exhibits that
23 were provided by your counsel, LS Exhibit 4 and LS Exhibit 6,
24 which I will represent to you are the Rule 26 disclosures your
25 firm compiled and served on Plaintiff's counsel in this case.

1 Can you take a quick look at them and with the idea
2 that my question is going to be whether you recognize them and
3 whether they are true and correct so that I can move them into
4 evidence?

5 And my question simply is: These are your firm's
6 Rule 26 disclosures in this case; is that correct?

7 A. I think that's correct, yes.

8 MR. von OHLEN: Okay. I would move them into
9 evidence.

10 THE COURT: Any objection to LS No. 4 and LS No. 6?

11 MR. LEONARD: None.

12 THE COURT: Okay. Those will be admitted.

13 Thank you.

14 (Leavens Strand Exhibits 4 and 6 were offered and received
15 in evidence.)

16 BY MR. von OHLEN:

17 Q. Two of the other names, and specifically they are on LS-6,
18 I believe, are Chris Ligutan -- I will spell that for the
19 court reporter, L-i-g-u-t-a-n -- and Kai Sibley, K-a-i,
20 S-i-b-l-e-y. And those names are in your supplemental
21 disclosures. I believe that is LS Exhibit No. 6.

22 Did you ever contact either one of those people to
23 determine whether they had potential sources of ESI that might
24 relate to this case?

25 A. No, I did not.

1 Q. Okay. Did you ever talk to Kai Sibley at all?

2 A. No.

3 Q. Do you know who she is?

4 A. I understand who she is. I have been told who she is.

5 Q. What's your understanding?

6 A. That she is the wife of Bill Edmiston.

7 Q. Okay. And one that was at the Las Vegas gaming
8 convention, correct?

9 A. Yes, correct.

10 Q. Okay. Do you know whether anybody at your firm ever
11 contacted her?

12 A. I don't know.

13 Q. Whose responsibility was it to put together these Rule 26
14 disclosures?

15 A. Which one?

16 Q. Either one, Exhibit No. 4 or 6.

17 A. Well, one of them is signed by me and one of them is
18 signed by Mr. Life, so I assume that that reflects who did it.

19 Q. Okay. And I don't want to assume because a lot of times
20 associates prepare things and partners sign them. So let's
21 just take them one at a time.

22 LS-4, were you responsible for compiling that?

23 A. Is that the one I signed?

24 Q. Let's get to the last page.

25 Yep.

1 A. Yes, because they are not identified by number as I'm
2 looking at them here.

3 So, yes, that's -- oh, yes, at the bottom, yes.

4 Yes, I prepared that.

5 Q. Okay. So you are responsible for putting together LS-4,
6 correct?

7 A. Yes.

8 Q. And then LS-6, because it is signed by Mr. Life, that's
9 his responsibility, correct?

10 A. I assume, yes, uh-huh.

11 Q. Do you know whether you looked at LS-6 before it was
12 transmitted to Plaintiff's counsel?

13 A. I don't know.

14 Q. Okay. So we are going back to that time frame, which is,
15 again, the filing of the complaint in September 2012 to the
16 end of fact discovery, July 1st, 2015.

17 During that period of time, did you inquire of Brent
18 Duke the identity of his cell phone or texting accounts and
19 related login information?

20 A. No.

21 Q. Do you know if anybody at your firm did?

22 A. I do not know.

23 Q. Did you or anyone at your firm inquire of Mr. Duke
24 regarding the cell phone or texting accounts for his employees
25 Laurie Duke, Robert Hough, Bryan Kos or -- let's just leave it

1 at those -- in order to obtain their service provider or login
2 information?

3 A. I don't believe we did.

4 Q. During that same period of time, did you or anyone at your
5 firm inquire of Brent Duke regarding the identity of any
6 online messenger accounts such as Yahoo! Chat, Gtalk, Skype,
7 or any other messaging account and obtain login information
8 for those accounts?

9 A. No. The answer is all based -- you know, you are asking
10 about login information. We did not get login information.

11 Q. Okay. So let's separate it out, then.

12 Did you, during that same period of time, inquire of
13 Mr. Duke regarding just the identity of any online messenger
14 account such as chat, Gtalk, et cetera?

15 A. We talked about the fact that he had used chat, I believe,
16 in the past, and his methods of preserving it. I do recall
17 that.

18 Q. Okay. And when you say "chat," I want to make sure we are
19 talking about the same thing. That's the Yahoo! Messenger
20 chat or just chat in general?

21 A. Chat as a category.

22 Q. Chat as a category. Okay.

23 Was it you who spoke to Mr. Duke about that?

24 A. Yes.

25 Q. Okay. And when was that?

1 A. That was very early 2012, talking to him generally about
2 his electronic records, electronically stored information.

3 Q. Now, when you say "very early in 2012," the case wasn't
4 filed until September 2012.

5 Was it after that?

6 A. Right. I didn't mean to give the wrong impression. Yes,
7 it was certainly after the case had been filed.

8 Q. Okay. And you have a specific recollection of telling
9 Mr. Duke to retain and preserve and maintain any chat
10 information or ESI that he might have?

11 A. The discussion was more along the lines of making sure I
12 understood how he preserved it, and he said anything that was
13 material, that he would copy it, and I don't recall how he
14 would retain it, whether it was a document or whether he would
15 send it to himself by e-mail, or maybe he did both methods,
16 but anything that was material and any chat, he had preserved
17 it in that way.

18 Q. Okay. So let's break that down a little.

19 So we are talking about chat as a category, not any
20 specific chats when you are giving these instructions; is that
21 correct?

22 A. Correct.

23 Q. Okay. And you said anything that was material, he would
24 copy it, correct?

25 A. That was his -- he was telling me what his practice had

1 been.

2 Q. Okay. So you didn't tell him to do that. He just
3 said -- you were having a conversation, and he said, "Hey,
4 anything that's material, I'm going to copy it"?

5 A. Well, I think --

6 Q. This is important. That's why I want to get --

7 MR. SMITH: Your Honor --

8 THE COURT: Go ahead and let him finish.

9 Go ahead and finish. You are answering a question.
10 Go ahead and answer that question, unless there is an
11 objection.

12 MR. SMITH: That was about letting the witness
13 finish, your Honor.

14 THE COURT: Okay. Go ahead and finish your answer.

15 THE WITNESS: This was part of the discussion about
16 his preservation, which is "How do you preserve chat?"

17 "Well, the way I preserve chat is this way."

18 So that's the nature of the conversation.

19 BY MR. von OHLEN:

20 Q. Okay. And he said anything that is material. He used
21 that word, "material"?

22 A. It was -- I believe it was "material," but it was
23 certainly anything that related to his business that had any
24 kind of importance.

25 Q. Okay. And did you give him any instructions on who gets

1 to decide what is material?

2 A. I don't recall. I don't remember whether I gave him any
3 instructions along those lines.

4 Q. Did you ever memorialize anything regarding that
5 conversation in writing with Mr. Duke?

6 A. I don't recall that I did.

7 Q. Did you ever take any notes from that conversation about
8 what we just talked about, that anything that was material, he
9 would copy it?

10 A. I don't think so.

11 Q. Okay. So we are relying on your recollection here today;
12 that's correct?

13 A. You should, yes.

14 Q. Okay. All right. Now, again, during that same period of
15 time, did you inquire of Brent Duke regarding the identity of
16 any social media accounts such as Facebook, Instagram,
17 LinkedIn, or Twitter?

18 A. Did we discuss those?

19 Q. Yes.

20 A. I believe we did. I don't recall anything about Twitter.
21 What I understood about Facebook is that he had files relating
22 to things that had been posted there. I don't recall that we
23 had a specific conversation about his accounts per se.

24 Q. So is it your testimony that you did discuss the identity
25 of the social media accounts as they might relate to his

1 obligations to preserve data in this case?

2 Is that your testimony?

3 A. It's less clear in my mind how it is that he saved
4 anything that might be posted on a social media account. It
5 wasn't -- I don't know that we had this discussion about
6 getting into the -- like logging in to get the data out of it.
7 I was of the impression more that if there are things that
8 were posted, there was ways in which there were copies of that
9 material.

10 Q. At that time, did you -- or at any time, did you obtain
11 his login information for any social media accounts?

12 A. I don't think so.

13 Q. When you gave him -- strike that.

14 When you had this interaction with him about social
15 media accounts, was that at the same time that you had the
16 conversation about the chat accounts?

17 A. Yeah, it was all pretty much -- well, we had more than one
18 conversation, first of all, about this, but I can't say what
19 was discussed at any particular one, but I know we had more
20 than one conversation.

21 Q. And just so that I don't have to ask it over and over
22 again, do you have any notes regarding any of these
23 conversations about his social media accounts and what you
24 discussed with him about those accounts?

25 A. No.

1 Q. Any e-mail accounts, any notes regarding what you
2 discussed with them about those?

3 A. I don't think that there is any e-mail that talks about
4 social media accounts.

5 Q. I'm sorry. I may have mis-phrased that.

6 So do you have any notes regarding your discussions
7 with Mr. Duke that memorialize these discussions about either
8 his e-mail accounts, his cell phone accounts, his texting
9 accounts, his social media accounts?

10 Do you have any notes?

11 You had these conversations. Did you take any notes
12 and are they in your file?

13 A. No, I don't believe so.

14 Q. Okay. During that same period of time, did you inquire of
15 Mr. Duke regarding any document storage accounts, such as
16 Dropbox, and advise him of his obligations to preserve ESI?

17 A. I don't recall any discussion about Dropbox specifically,
18 no. It was a general -- starting from the general "Don't
19 delete anything, preserve all your data," but I don't remember
20 specifically conversation about Dropbox.

21 Q. Okay. And during this same period of time, did you
22 inquire of Mr. Duke regarding his Amazon account, his eBay
23 account, his PayPal account, his BluePay account, and tell him
24 his obligations with regard to preserving ESI with regard to
25 those accounts?

1 A. Well, what I understood about Amazon -- well, yes, I guess
2 the answer is, yes, I did, because these were payment
3 processes that he had. So he needed to preserve the
4 documentation, what would show whatever advertising he may
5 have been doing. He needed to show anything having to do with
6 sales. He needed to preserve anything having to do with
7 payments that he received, yes.

8 I don't recall necessarily a discussion about
9 preserving Amazon specifically or PayPal or whatever, but we
10 did discuss those as ways in which he received revenue during
11 various times.

12 Q. And that they might be relevant to his case, correct?

13 A. Yes.

14 Q. And did you memorialize anything with regard to those
15 payment accounts?

16 A. No.

17 Q. Neither in your file nor confirming with Mr. Duke?

18 A. Nothing that I remember.

19 Q. Okay. So I want to make sure I have captured the universe
20 here. We have what we believe to be Heather Liberman's notes,
21 which are marked as LS-14 and LS-15.

22 Are you aware of any other notes, any other memoranda
23 in your file, anything that would memorialize what was
24 communicated between you or anybody at your firm with Mr. Duke
25 regarding his obligations to preserve documents or ESI in this

1 case?

2 A. I mean, there may be something. I don't know.

3 Q. You haven't looked for it?

4 A. Well, that would be privileged, wouldn't it?

5 THE COURT: Why do you think we are here?

6 Have you looked for documents, notes, your own notes,
7 on whether you told Mr. Duke to preserve ESI?

8 THE WITNESS: I don't have any documents like that.

9 THE COURT: Okay. But the question is did you look
10 for them?

11 THE WITNESS: Yes.

12 THE COURT: There is the answer.

13 BY MR. von OHLEN:

14 Q. And you didn't find any, right?

15 A. That's right.

16 Q. So what we have here is LS-14 and LS-15. That's the
17 universe, correct, as far as you know?

18 A. As far as I know, that's right.

19 Q. Okay. So now we have nibbled at all of these topics, but
20 here's the big question: So did you ever advise Mr. Duke
21 regarding his legal responsibilities to preserve ESI, and how
22 many times did you do it, and to the best of your
23 recollection, when?

24 A. I gave him those instructions. I don't know if I used the
25 word "ESI," but electronic records, and I mentioned that the

1 very first time we met, that he had that obligation.

2 And I don't know how many more times I would have
3 said anything about that. Like I know that there were more,
4 but it would have been early in the case when we are talking
5 about what the universe of his electronic information is and
6 what his paper -- his documentation is.

7 Q. And prior to this case, were you familiar with e-mail
8 providers such as Gmail or Yahoo! or AOL or anything like
9 that?

10 A. Yes.

11 Q. Okay. Did you have an account with any of those folks?

12 A. I had a Gmail account and an AOL account.

13 Q. Okay. And is that going back even before this case
14 started in 2012?

15 A. I believe so, yes.

16 Q. Okay. And presumably, like the rest of us, you have a
17 username, and you have a password in conjunction with those
18 accounts, correct?

19 A. Correct.

20 Q. Okay. Going back again to the word "material" that you
21 used in response to one of my questions, when Mr. Duke said
22 that he would keep anything that was material, is that the
23 same conversation where he said, "I keep everything, and I
24 won't delete anything"?

25 Is that the same conversation, or are those different

1 conversations?

2 A. Well, he mentioned that he didn't delete anything multiple
3 times. We did not have multiple -- the same number of
4 conversations about how he preserved chat.

5 Q. Okay. And with regard to these conversations, and I'm
6 sure you are aware, that there is a difference between saying
7 "I'm not going to delete anything" and "I'm going to copy
8 something and protect it in some fashion from either age or
9 corruption or deletion or anything like that."

10 You understand there is a difference between
11 preserving something and copying something, correct?

12 A. Yes.

13 Q. Okay. Did you give him any instructions about copying
14 either his e-mails or his -- any of his electronically stored
15 information as opposed to "I will just keep what is material
16 to this case"?

17 A. Well, he was to preserve everything. The issue about chat
18 is because it is ephemeral, and it goes away. So how do you
19 preserve something under those circumstances? And he
20 explained to me this is what his practice was.

21 Q. Okay. And I guess my question is, and let me make it a
22 little simpler, did you tell him to make copies of these
23 databases so that we would have a snapshot in time as to what
24 existed whenever you gave him these instructions?

25 A. I don't think I did.

1 MR. von OHLEN: Could you put up Exhibit No. 64,
2 please?

3 I'm getting into a new area here as well.

4 BY MR. von OHLEN:

5 Q. Can you see that, Mr. Leavens?

6 A. Yes.

7 Q. So let's start with the foundation.

8 Is this your sworn declaration in this case? And it
9 is dated May 14, 2018.

10 A. Yes.

11 Q. And is that your signature at the end?

12 A. Well, I believe so, without seeing it.

13 Q. All right. Well, we can scroll to the end if you want.

14 Do you want us to scroll to the end?

15 A. No, you don't need to. I have seen the document before.

16 Q. All right. Did you write this declaration?

17 A. I contributed to the writing of it, yes.

18 Q. Explain what that means.

19 A. Well, I think that there are others who were involved. I
20 can't tell you who, or who did what, but it was something that
21 was certainly reviewed by others on the defense team.

22 Q. Okay. Well, I have got to say I don't understand that
23 answer.

24 So this is your sworn declaration --

25 A. Yes.

1 Q. -- right?

2 A. Yes.

3 Q. And you realize that you are under the pains and penalties
4 of perjury with regard to signing?

5 A. I didn't mean to detract from that at all.

6 Q. Okay. And so now my question is, and it is real simple:
7 Did you write this declaration?

8 A. It's my declaration.

9 Q. Not my question.

10 Did you write -- I know you signed it.

11 Did you write it, or did somebody else write it?

12 A. I am trying to answer you honestly, and any kind of
13 document, it gets edited by others making contributions.

14 So this is my declaration. I stand by it.

15 Q. And I understand that, but -- and I don't mean to be
16 difficult, but if you didn't write it, and other people had
17 input, who are those people who helped you write it and who
18 are those people who had input?

19 A. I don't remember who. It would be the defense team, but I
20 don't remember any specific individual. I'm giving you the
21 best answer as I can with respect to what the process is of
22 creating a document like this.

23 Q. Okay. Well, let's define the universe of who it could
24 have been, then.

25 Who could it have been who helped you write your

1 sworn declaration in this case?

2 A. This is speculation, but the defense would be
3 Mr. Stamatis, Mr. Shonder, and Mr. Life.

4 Q. You understand that sworn declarations have to be based
5 upon personal knowledge, correct?

6 A. Yes.

7 Q. Okay. Is everything in this declaration that you swore to
8 being true, is it based upon your personal knowledge?

9 A. Yes.

10 Q. Okay. How did you communicate that personal knowledge to
11 somebody who wrote or helped you write this sworn declaration?

12 A. I am simply speculating that there was contributions made
13 by others. You asked me if I wrote this, as if I wrote a
14 hundred percent of it, and I'm just giving you what I think is
15 the best answer, which is this is all my personal knowledge,
16 this is my declaration, I stand by it, but there may have been
17 edits that people had proposed.

18 THE COURT: And, look, you have said that a couple
19 times. You have clearly adopted the document. You have
20 signed the document, even though it is not your signature, but
21 you have signed it.

22 But it is a fair question to know who added things to
23 this document, what they added, who removed things from this
24 document, and what did they remove. I assume that is where
25 this line of questioning is going, and it is all fair.

1 So if you want to go through -- I don't know if there
2 is drafts of this with a red line somewhere, that would be
3 helpful, but go ahead and follow up. That's where this is
4 going.

5 BY MR. von OHLEN:

6 Q. Well, those are all great questions.

7 So let's just start with were there drafts of this
8 that were presented to you?

9 A. I don't think so. I don't think that's the way the
10 process worked.

11 Q. Why don't you tell me how the process worked.

12 A. The process that worked for me was to prepare this, as I
13 remember, anyway, and it would be reviewed by -- and, again, I
14 don't remember who, but there would certainly be contributions
15 that people might make.

16 Q. So if there weren't drafts that were presented to you, was
17 something just presented to you, you read it, and you signed
18 it?

19 A. No.

20 Q. Well, if that's wrong, tell me where it's wrong.

21 A. I wrote it, wanting to make sure that it was correct, and
22 with respect to any contributions by anybody else, did I miss
23 something, is this clear. You know, those kinds of things.

24 Q. Okay. Well, I heard you say you wrote it. So are you
25 saying now that you personally wrote this declaration?

1 A. Well, I did. I did. But, again, I was trying to be as
2 careful in my answer to you as I could be.

3 Q. And I just have to ask this question again. You know, did
4 you write this, or is this a compilation of some other people
5 who wrote it and then presented it to you?

6 A. It's the former.

7 Q. You wrote it?

8 A. I wrote it, given everything else we have just discussed,
9 yes.

10 Q. So everything in here is based upon your personal
11 knowledge?

12 A. I believe so, yes.

13 Q. Well, I mean, it is either a yes or a no.

14 THE COURT: What don't you think is based upon your
15 personal knowledge?

16 THE WITNESS: I'm sorry. What?

17 THE COURT: What don't you think is based upon your
18 personal knowledge?

19 THE WITNESS: Let me read it through and see if there
20 is anything.

21 THE COURT: Yeah.

22 MR. von OHLEN: Sure. Go ahead.

23 (Brief pause.)

24 BY MR. von OHLEN:

25 Q. Are you ready, Mr. Leavens?

1 A. I am. There is the section, Section 7, that is based
2 principally upon my review of e-mail correspondence, having to
3 do with correspondence between Ms. Liberman and Brian Gaynor.

4 Q. Okay. So you are saying that Paragraph 7 is not based on
5 your personal knowledge?

6 A. It's personal knowledge of my review of the e-mails, but I
7 was not engaged in those communications.

8 Q. Anything else?

9 A. Can you flip to the next page again?

10 No, I think that's the qualification that I would
11 make.

12 MR. von OHLEN: We move Plaintiff's 64 into evidence.

13 THE COURT: Any objection?

14 MR. LEONARD: None.

15 THE COURT: Okay. 64 is admitted.

16 (Plaintiff's Exhibit 64 was offered and received in
17 evidence.)

18 BY MR. von OHLEN:

19 Q. Who selected the e-discovery vendor 4Discovery that
20 Defendants retained in this case?

21 A. We got bids from two, maybe three consultants, and we
22 offered Mr. Duke the opportunity to express his preference,
23 and he preferred the 4Discovery.

24 Q. So in terms of selection, Mr. Duke selected them based
25 upon a universe that you provided to him; is that correct?

1 A. Based upon a universe, you said?

2 Q. That you provided to him?

3 A. Yes, yes.

4 Q. Okay. Did you personally interview 4Discovery in order to
5 narrow that universe?

6 A. No.

7 Q. Did Ms. Liberman interview them?

8 A. Did Ms. Liberman what?

9 Q. Interview 4Discovery and the other ones that you were
10 considering?

11 A. Yes.

12 Q. Okay. Did she report back to you on the basis of those
13 interviews?

14 A. Yes.

15 Q. Okay. And did you approve the selection of 4Discovery?

16 A. Yes.

17 Q. Okay. And did you tell Heather Liberman to run it by
18 Brent Duke?

19 A. Yes.

20 Q. Okay. And Mr. Duke approved it?

21 A. Yes.

22 Q. Okay. And 4Discovery was retained on or about
23 December 9th, 2014, and that's according to the 4Discovery
24 statement of work referenced in Exhibit 65; is that correct?

25 A. What was the date again?

1 Q. December 9th, 2014.

2 A. Okay.

3 Q. Does that ring a bell with you?

4 A. Yes.

5 Q. Okay. What instructions did your firm give 4Discovery
6 with regard to this case and who gave those instructions to
7 them?

8 A. The instructions would have been communicated by
9 Ms. Liberman.

10 Q. Okay. Did you have any involvement in communicating those
11 instructions?

12 A. I don't recall that I had direct communication with
13 4Discovery.

14 Q. How about giving Ms. Liberman some instructions on what
15 kind of instructions she should give to 4Discovery?

16 A. To proceed with the search of the ESI for 21 Century
17 Smoking with the search terms that had been provided by the
18 Plaintiffs.

19 Q. To proceed with applying the search terms to what?

20 A. Well, to the four computers that Mr. Duke had indicated
21 were, essentially, the universe of his ESI.

22 Q. And those instructions were memorialized in an engagement
23 agreement, correct?

24 A. There was an agreement that was signed; is that what you
25 mean, with the 4Discovery?

1 Q. I'm reading from your sworn declaration, Paragraph 8: "I
2 approved the selection of the vendor, and Ms. Liberman
3 coordinated the completion of the engagement agreement with
4 the vendor."

5 Do you remember that?

6 A. Okay. I see that.

7 Q. Okay. So my question: Your instructions were
8 memorialized in some type of engagement agreement.

9 You described that in your sworn declaration, right?

10 A. Yes.

11 Q. And that happened, right?

12 A. Yes.

13 MR. von OHLEN: Okay. Okay. Let's put up LS
14 Exhibit 21.

15 BY MR. von OHLEN:

16 Q. And I will represent to you that this is a document that
17 was turned over by your lawyers in the last ten days in this
18 case, I can't remember exactly, and marked as LS-21.

19 Have you seen this before?

20 A. Yes.

21 Q. Do you want to take a look at it just to refresh your
22 recollection?

23 A. Sure.

24 Q. Okay. I think it is four or five pages.

25 Tell Mr. Moffitt when you want to turn pages.

1 A. Okay. Good. I was looking at the other table.

2 Is there a signature page?

3 Okay. Thank you.

4 Q. So my question to you: Is this the engagement agreement
5 that you referred to in Paragraph 8 of your declaration?

6 A. Yes.

7 Q. So there is no other engagement agreement.

8 This is it, correct, as far as you know?

9 A. As far as I know, yes.

10 Q. Okay. And if we look on the first page, it has some
11 handwriting. There is a cross-out of "Heather Liberman," and
12 it says "Brent Duke, 21C."

13 Do you see that?

14 A. Yes.

15 Q. Do you know who put that handwriting?

16 A. I don't. It looks like it might be Heather's, but I don't
17 know for sure whether it was.

18 Q. Okay. And do you know -- do you have any understanding
19 why there is that handwriting on this document?

20 A. I don't unless there was some discussion about who was
21 going to be the contracting party.

22 Q. Okay. Now, you did ask about the last page, and the
23 signature page.

24 MR. von OHLEN: And I would ask us to flip to that.

25

1 BY MR. von OHLEN:

2 Q. Do you see that?

3 A. Yes.

4 Q. Okay. So this one appears to be unsigned. Did you
5 ultimately sign this -- I'm going to call it "statement of
6 work" simply because it says that on the front.

7 Could we agree to call it "statement of work"?

8 A. Yes.

9 Q. Okay. Did you sign this document?

10 A. I don't remember.

11 Q. Well, I will represent that this came from your lawyers,
12 and I assume they got it somehow.

13 Did they ask you to go back into your file and look
14 for the statement of work or the engagement letter?

15 A. I haven't seen one that is signed. Maybe 4Discovery has
16 it, but I --

17 Q. Okay. So you don't know whether or not you signed it; is
18 that fair?

19 A. I don't know for sure. I assume I did, but I don't know
20 for sure.

21 Q. Okay. And you don't have one in your file, and you have
22 looked for it?

23 A. I didn't see one. That's right.

24 Q. Okay. Now, as you were engaging 4Discovery in this case
25 to perform certain tasks, did you send a copy of the statement

1 of work to Mr. Duke for his review and approval?

2 A. I don't remember if we did or not.

3 Q. When you went back to look in the file, did you find
4 anything like that, some communication with Mr. Duke regarding
5 this statement of work?

6 A. I don't remember.

7 Q. Well, you would have done that recently, I assume,
8 correct?

9 A. I don't remember seeing it. Maybe I did, and I didn't --

10 Q. Okay. So as we are sitting here today, you have no
11 recollection whether or not you signed it and whether or not
12 that you sent it to Mr. Duke for his review; is that fair?

13 A. I assume I signed it because they went ahead and did the
14 work. So I would have been the one to sign it.

15 Q. Well, the reason I ask is because there is a cross-out on
16 the first page, and it says "Prepared for," and Heather
17 Liberman's name is crossed out, and they put in "Brent Duke,
18 21C"?

19 You see that on the first page, right?

20 A. Uh-huh.

21 Q. So I don't want to put words in your mouth, but that would
22 suggest to me that it is being prepared for somebody next to
23 the cross -out, Brent Duke, 21C.

24 I mean, does that help refresh your recollection of
25 who the client was, at least with regard to this statement of

1 work?

2 A. Well, you make a good point, but I don't remember. Maybe
3 4Discovery would have the actual document with the signature.

4 Q. Okay. Well, fair enough, if you don't remember, you don't
5 remember.

6 On the last page, of course, it says: "Client:
7 Leavens, Strand & Glover."

8 Did you consider yourself the client with regard to
9 this engagement?

10 A. I think we did.

11 Q. Okay. Did Mr. Duke ever communicate with you at any time
12 regarding the scope of the 4Discovery engagement in this
13 matter?

14 A. I'm sorry, one of the words dropped out.

15 Did he ever?

16 Q. Let me go back.

17 Did Mr. Duke ever communicate with you at any time
18 regarding the scope of work that you asked 4Discovery to do in
19 connection with this case?

20 A. I know there was communication with Mr. Duke about what it
21 was that was being searched, if that's what you mean, and it
22 was these four computer hard drives.

23 Q. Okay. Well, I'm just asking the specific question
24 of -- let me give you some foundation.

25 You gave 4Discovery a mission in this case, correct?

1 You communicated to them, correct?

2 A. Me personally, no.

3 Q. Well, you or Heather Liberman under your direction,
4 correct?

5 A. Yes.

6 Q. Okay. And that mission was defined, and we will get to it
7 in a minute, in the statement of work, correct?

8 A. Correct.

9 Q. Okay. Did you ever communicate with Mr. Duke regarding
10 the mission that you were assigning to 4Discovery?

11 A. He understood, yes.

12 Q. Okay. That's different than whether you communicated.

13 Did you communicate with him and say, "We are having
14 4Discovery do what's exactly on Page 2 of this document"?

15 A. Yes, this document was the end result of a process where
16 Mr. Duke understood what it is that we were doing as far as
17 the search of his ESI with the search terms. He was involved
18 with the process of selecting this company. So that's why I'm
19 pausing on your questions here.

20 Q. Well, really, my question just goes to did you
21 communicate.

22 They have a mission, and you said -- I think your
23 testimony was you weren't sure whether or not he saw the
24 statement of work or whether he signed it; is that correct?

25 A. Right. I don't know whether Mr. Duke signed that, that's

1 right.

2 Q. Okay. And you don't know whether or not you sent it to
3 him, correct?

4 A. I don't know off the top of my head whether we sent it to
5 him.

6 Q. Okay. So I have gone beyond signing and whether you sent
7 it, and now I'm talking about did you ever communicate with
8 him, orally or in an e-mail or in any possible other way,
9 about what the scope of the mission is, which is -- I mean, it
10 is clearly defined here. I'm not going to read the whole
11 document, but it is on Page 2.

12 Did you communicate with him specifically that that
13 was the mission?

14 A. He saw that, yes, that was part of the bid. There is also
15 the objective there to provide consulting and expert services.

16 Q. Okay. Well, fair enough.

17 So you did communicate to him that their mission was
18 only to create -- and I'm going to read right from this
19 document, so read along with me.

20 Phase 1; do you see that?

21 A. Yes.

22 Q. "Phase 1: Remote Forensic Imaging"; do you see that?

23 A. Yes.

24 Q. Okay. The next step is three bullet points in an adjacent
25 box; do you see that?

1 A. Yes.

2 Q. And it says -- the first bullet point is: "Create a
3 remote forensic image of four computers: Cost: \$500 per
4 computer," right?

5 A. Yes.

6 Q. The second one is: "Maintain a sound chain of custody
7 documentation and perform image authentication."

8 Do you see that?

9 A. Yes.

10 Q. Okay. And the third one is: "Maintain a copy of data."

11 Correct?

12 A. Correct.

13 Q. Okay. And Phase 2 says: "Analysis."

14 Right?

15 A. Correct.

16 Q. And the first bullet point says: "Perform search against
17 collected data using client-supplied search terms."

18 Have I read that correctly?

19 A. Yes.

20 Q. And the second bullet point says: "Produce resultant data
21 to client."

22 Correct?

23 A. Yes.

24 Q. And the third and fourth bullet point just give estimates
25 of the amount of time to do it and the cost to do it; is that

1 correct?

2 A. Correct.

3 Q. All right. So this is -- we can agree that this is the
4 scope of the 4Discovery mission, right?

5 A. Well, if you add the consulting in there, yes.

6 Q. Okay. For whatever additional -- fair enough.

7 I mean, whatever is in the third box, "Additional
8 Consulting"?

9 A. Yes.

10 Q. Which says the amount of money that they are going to
11 charge you "for expert testimony as may be required and
12 mutually agreed in support of this project," correct?

13 MR. SMITH: Well, objection, your Honor. It is not
14 just expert testimony. It says more than that.

15 THE COURT: It does say more than expert testimony.
16 It says --

17 MR. SMITH: It says "additional e-discovery
18 consulting." That's my objection, your Honor.

19 THE COURT: It says "Additional Consulting" in the
20 blue box, on the left side, and it says:

21 "4Discovery charges 295/hour for additional
22 e-discovery consulting and 395/hour for expert testimony as
23 may be required and mutually agreed upon in support of this
24 project."

25 I got it. All right. So that's what it says. We

1 all agree to that. We are good.

2 MR. von OHLEN: Okay. All right.

3 BY MR. von OHLEN:

4 Q. So that's the sum total of what the mission was here,
5 correct, in those three boxes?

6 A. Yes.

7 Q. Okay. So did you ever engage 4Discovery after February of
8 2015 for any additional consulting services?

9 A. Yes.

10 Q. When?

11 A. Well, not me personally, but that was in, I think,
12 sometime in -- sometime in May of 2018.

13 Q. Okay. So fair enough.

14 So my point would be did you ever engage them again
15 before discovery closed in this case on July 1st, 2015?

16 A. I don't believe so, no.

17 Q. I want to make sure that this is the universe of what you
18 engaged them for. It's in the first two boxes, and there was
19 nothing in the third box in terms of additional consulting
20 until after discovery was closed; is that a fair statement?

21 A. Well, we certainly would have expected them to give
22 us -- provide us the consulting services, if it was necessary.

23 Q. Of course, if you asked, but you just said you didn't ask
24 them.

25 A. Or for them to point that out. That's why we engaged

1 them. They were experts.

2 Q. Okay. Well, we will get to what they should have pointed
3 out in a minute, but I'm just getting to what you engaged them
4 to do, and this is what they did and nothing else?

5 A. That's right.

6 MR. von OHLEN: Before I forget, let me move LS-21
7 into evidence.

8 THE COURT: Any objection?

9 MR. LEONARD: No.

10 THE COURT: All right. LS-21 will be admitted.

11 (Leavens Strand Exhibit 21 was offered and received in
12 evidence.)

13 MR. von OHLEN: I'm sorry. Did the Judge ask a
14 question?

15 THE COURT: No, I said LS-21 is admitted.

16 MR. von OHLEN: Okay. All right.

17 BY MR. von OHLEN:

18 Q. All right. With regard to LS-21 in the first box where it
19 says: "Create a remote forensic image of four computers"; do
20 you see that?

21 A. Yes.

22 Q. Were those four computers the laptops of Brent Duke,
23 Laurie Duke, Robert Hough, and Bryan Kos?

24 A. Yes.

25 Q. Okay. Who made the decision to limit the scope of the

1 inquiry to those four laptop computers?

2 A. That was the universe as it was presented to us.

3 Q. Well, you engaged them, correct?

4 A. I'm sorry. What?

5 Q. You engaged 4Discovery, correct?

6 A. Yes.

7 Q. And you gave them the instructions -- or you or

8 Ms. Liberman gave them the instructions, correct?

9 A. Yes.

10 Q. Nobody else did, correct?

11 A. No, there was nobody else who was instructing them on

12 this, right.

13 Q. Did you or, to your knowledge, Ms. Liberman or anyone at

14 your firm advise 4Discovery of Mr. Duke's e-mail accounts with

15 GoDaddy and Yahoo! in 2014, when they were retained?

16 A. When they were what? I'm sorry.

17 Q. When they were retained.

18 A. I don't know.

19 Q. Well, who would know?

20 A. Well, I would know if -- well, I don't know that we did.

21 Thinking it through, it would have been Ms. Liberman who was

22 directly in touch with them, but she would have instructed me

23 about what her conversations would have been with them.

24 Q. Okay. Well, do you know if anyone provided 4Discovery

25 with the login and password information for those GoDaddy and

1 Yahoo! accounts?

2 A. I do not.

3 Q. Did you or anyone at your firm advise 4Discovery of any of
4 Mr. Duke's cell phone or texting accounts and provide them
5 with login information for those accounts?

6 A. No.

7 Q. Same question: Did you or anyone at your firm advise
8 4Discovery of Mr. Duke's chat accounts or any kind of
9 messenger account and provide them with login information for
10 those accounts?

11 A. No -- well, I have to -- there was a later time that login
12 information was provided, but that has to do with the Yahoo!
13 search in 2018.

14 Q. Fair enough, and I didn't give you a time frame for that.

15 So the time frame that I was asking about was, you
16 know, from the time that you retained 4Discovery until the
17 time fact discovery was closed.

18 Just within that time frame, did you give them any
19 login information on any of those accounts?

20 A. No, no.

21 Q. In fact, you didn't even identify those accounts for them,
22 correct?

23 A. I don't think we did.

24 Q. To your knowledge -- well, let's start with you.

25 Did you or anyone at your firm advise 4Discovery that

1 you sat with Mr. Duke in front of his computer in 2013 and
2 printed e-mails and printed screenshots from Mr. Duke's Yahoo!
3 account?

4 Did you advise anybody at 4Discovery of that fact?

5 A. I didn't catch the first part of what you are saying.

6 Q. Okay. Let's break it down.

7 There came a time where you sat with Mr. Duke in
8 front of his computer, correct?

9 A. Yes.

10 Q. Okay. And you saw -- and he brought up various
11 information on that computer, correct?

12 A. Yes.

13 Q. And you were looking at it, right?

14 A. Yes.

15 Q. You were with him. You were sitting right next to him,
16 right?

17 A. Yes.

18 Q. And at that time, you saw some information related to
19 Yahoo!, correct?

20 A. I don't remember anything being identified as Yahoo!.

21 Q. Okay. You don't remember -- I'm going to come back to
22 that, sir, because I need to look at some documents.

23 Do you know whether or not 4Discovery conducted an
24 in-person interview with Mr. Duke regarding potential sources
25 of ESI in this case?

1 A. I don't have any knowledge of anything like that.

2 Q. You don't think that they did. You didn't instruct them
3 to do an interview of Mr. Duke regarding ESI, correct?

4 A. That's right.

5 Q. Do you know whether or not 4Discovery did any kind of
6 remote interview with Mr. Duke regarding sources of ESI by
7 chat or phone or anything else?

8 A. They were directly in touch with him about the duplication
9 of his computers, yes.

10 Q. The four laptop computers that we talked about, right?

11 A. That's right.

12 Q. Okay. So is it fair to say that you didn't instruct
13 4Discovery to contact Mr. Duke and perform an interview with
14 him regarding all the sources of ESI?

15 Is that a fair statement?

16 A. Yes.

17 Q. Do you know whether 4Discovery ever personally handled or
18 touched Mr. Duke's computers in order to copy their hard
19 drives?

20 A. I don't know that they did. I think the process was
21 equipment was sent to Mr. Duke, and he -- there were copies of
22 those computers that were made onto those devices, and then
23 those were sent out for searching.

24 Q. So did they call -- I think they referred to that as a
25 "remote collection," to remotely image the four computers.

1 Does that phrase ring a bell?

2 A. Yes.

3 MR. von OHLEN: Can you put up Plaintiff's 65,
4 please?

5 And could you scroll through so the witness can see
6 what's attached?

7 BY MR. von OHLEN:

8 Q. My question is: Do you recognize this document?

9 A. Yes.

10 Q. Okay. And tell the court what it is.

11 A. Well, it is a report from 4Discovery that includes -- if
12 you will go back, it includes information about the first
13 search that was done in 2015 and then information about
14 subsequent work that they did in 2018.

15 Q. Okay. And I'm going to refer to this as the -- and I'm
16 going to get his name wrong, probably, but the Gough letter,
17 unless you have a better pronunciation of his last name,
18 G-o-u-g-h.

19 A. I don't.

20 Q. Okay. So as we go through this -- and this report was
21 filed with the court, correct?

22 We know from the first page, right?

23 A. Yes, yes.

24 Q. Okay. And let's go back to the first page.

25 All right. So let's just start with the second

1 paragraph, and I think we already talked about this, that this
2 is when they talked about on or about December 9th, 2014, he
3 goes through a whole paragraph of how he was instructed by you
4 to examine digital media related to this matter, correct?

5 A. Correct.

6 Q. Correct?

7 A. Correct.

8 Q. Okay. And then he talks about that remote collection
9 process where he sends boxes out to Brent Duke, with
10 apparently some instructions, and it is up to Mr. Duke to,
11 apparently, connect all the data together, put it on a hard
12 drive, and send it back to 4Discovery.

13 Is that your understanding of the process?

14 A. Yes.

15 Q. Okay. And then Mr. Gough says: "A forensic analysis was
16 then performed by 4Discovery on the forensic images stored on
17 this hard drive."

18 Right?

19 A. Yes.

20 Q. So it would be fair to state, then, that 4Discovery never
21 performed -- before discovery was closed in this matter, they
22 never performed a forensic analysis with Plaintiff's ESI terms
23 on any of Brent Duke's online e-mail, texts, chat, or social
24 media accounts; is that correct?

25 A. Well, I don't know the extent to which that was on those

1 four hard drives.

2 Q. Okay. But with regard to anything -- well, fair enough.

3 So you don't know what was on those four drives. You
4 don't know the complete data on his -- on all those things
5 that were on his hard drives?

6 A. No, I was referring to some of the categories of things
7 that you had described, I assume are on the hard drive. We
8 know e-mail was on there. We know things related to the
9 social media. My understanding is that some of that was on
10 there. We just did not have login to other accounts.

11 Q. Well, you know now that the universe of his ESI wasn't on
12 those laptops, correct?

13 A. We know that now.

14 Q. Yeah.

15 A. We didn't know that then.

16 THE COURT: Who is "we"?

17 THE WITNESS: Pardon?

18 THE COURT: Who is "we"?

19 THE WITNESS: We as a firm, and based on the
20 testimony of Mr. Duke, I think he understood that that was
21 there, too. But I mean -- well --

22 BY MR. von OHLEN:

23 Q. You think that Mr. Duke understood that the totality of
24 his Yahoo! and GoDaddy e-mails were on his hard drives?

25 Is that your testimony?

1 A. He had made those representations.

2 Q. Okay. When did he make those representations to you?

3 A. Those were in the documents that -- one of the documents
4 that we had, that everything having to do with 21 Century was
5 on those four computers.

6 Q. Well, and I may be putting a finer point on it.

7 Did Mr. Duke represent to you that the universe of
8 all his GoDaddy e-mails was on his four computers?

9 A. His statement was to that effect.

10 Q. Well, I mean, to that effect, and did he use the
11 words -- did you ask him about the GoDaddy, and did he say,
12 "Yes, all my GoDaddy e-mails are on" -- I'm trying to figure
13 out what he said to you.

14 "They are all on there, Mr. Leavens, all my GoDaddy
15 e-mails, the whole universe is on my computer"?

16 A. No, no, he didn't say it in that way. I'm just going on
17 the basis of the document that I saw this morning.

18 Q. Okay. So other than that document, you don't have any
19 understanding about what Mr. Duke told you about where his
20 e-mails reside?

21 A. There is more. There is the initial disclosures from 2012
22 going forward and his communications with Mr. Life in
23 connection with searches.

24 Q. And I'm trying to just sort through that.

25 Is it your position that Mr. Duke advised you that

1 all his e-mails, the universe of his e-mails, meaning the
2 Yahoo! and the GoDaddy e-mails, were on his hard drive?

3 Did he ever advise -- let's start with you.

4 Did he ever advise you specifically of that?

5 A. What happened is that I did meet with him, and we had the
6 conversations about his electronically stored information, and
7 what I drew from the conversation that we had was that
8 everything existed on these computer hard drives, and that is
9 the way that I presented that in those initial disclosures.

10 They were given to him to review, and through
11 at least a couple versions, those things that were not
12 corrected, were not changed. And he later on -- you saw the
13 document later on -- today -- that showed his confirming to us
14 that everything with respect to 21 Century was on those four
15 computers. That's what we relied upon. That was wrong
16 information, but that was information that we relied upon.

17 Q. Okay. So is it fair to say that you drew an inference
18 from that conversation that the GoDaddy and Yahoo! e-mails
19 were all on the hard drives, but he never actually said those
20 words?

21 A. I can't remember. I can't remember, but that is
22 definitely where I was left after my conversations with him,
23 that those four hard drives were where that ESI was.

24 Q. And that e-mail that you referred to where he described
25 that "That's where all my information is," when is the first

1 time you saw that e-mail?

2 A. I saw that this year. That's what I remember.

3 Q. Did 4Discovery ever issue a written report as a result of
4 the work it did on behalf of your firm in this case?

5 A. I believe they did, yes.

6 Q. Where is that report?

7 A. I don't know. If they did issue something, it's probably
8 in our files.

9 Q. Okay. We would request that that be produced since it
10 seems to be pretty much on point.

11 Could you go back in your file and look for it if the
12 court directs you to produce it?

13 A. Yes.

14 MR. SMITH: My only concern, your Honor, is that if
15 we are in a discovery process, there were requests we would
16 have made a while back.

17 THE COURT: I'm sorry. What did you say?

18 MR. SMITH: I said if we are in a discovery process
19 here, there are requests we would have made a while back.

20 THE COURT: Well, it is November 7th, 2019. The
21 motion for sanctions was filed a long time ago. We knew about
22 these hearing dates. We knew 4Discovery was involved. We
23 have a contract with 4Discovery. We have a letter from
24 4Discovery. I'm -- I think the legal word
25 is -- "flabbergasted" that if 4Discovery completed a report

1 pursuant to the statement of work that that document hasn't
2 been produced to counsel, all counsel, and to me, quite
3 honestly, at this point.

4 MR. SMITH: I don't want anybody to get -- and I'm
5 not sure what the state of my knowledge is, but I think what
6 it is is a hit report. It is not a written report.

7 THE COURT: And I understand that, and I assume you
8 and I are on the same wavelength that their "report" would
9 have been, and their "analysis," produce resultant data to
10 client, which shows the documents where the search terms were
11 hit. If there is that document, I still think it would have
12 been produced somewhere in this litigation. If there is
13 something beyond that, I would think it is relevant to what we
14 are talking about here.

15 The statement of work is informative not only in what
16 it says, but also in what it doesn't say. There are fancy
17 little arrows here. It says: "Identify, Collect, Analyze,
18 Report."

19 "Phase 1: Remote Forensic of Imaging." That's just
20 collection. There is no identify. That's where this whole
21 thing goes sideways.

22 So if there is a report that talks about what we have
23 just -- what the testimony is, it would behoove everybody to
24 see that report.

25 Now, if it is a hit report, that shouldn't be hard to

1 find.

2 MR. SMITH: Your Honor, we will take a look and see
3 what they are asking.

4 THE COURT: And I don't know if it exists.

5 MR. SMITH: I don't want to be wrong about this, but
6 my recollection is that that's all there is, and we will look,
7 and we will be happy to --

8 THE COURT: That's fine.

9 And I understand your thought that a report would
10 just be a hit report, but if there is something else out
11 there, it would probably be helpful to know.

12 MR. SMITH: And I understand completely, your Honor,
13 and we will determine with certainty what the answer to that
14 question is.

15 THE COURT: Okay.

16 BY MR. von OHLEN:

17 Q. Regardless of the type of report or the lack of report,
18 did you advise Mr. Duke regarding the results of this forensic
19 examination?

20 A. I don't remember anything specific about that. I'm sure
21 we did in some way. We had communication with him, but I
22 don't remember anything specific.

23 Q. Okay. I don't want you to guess.

24 Do you have any knowledge whether it was or -- if you
25 did or you didn't report to Mr. Duke what the results of

1 4Discovery's forensic investigation was?

2 A. I believe we did, but I don't have any specific knowledge.

3 Q. And when you say you believe you did, did you do it by way
4 of writing or on the phone?

5 A. I think Mr. Life would probably be the best person to be
6 able to give the answer to that.

7 Q. Okay. So you don't have any personal knowledge on that
8 topic; is that fair?

9 A. I'm not recollecting anything, no.

10 Q. Did 4Discovery issue invoices and transmit them to your
11 firm?

12 A. I don't remember.

13 Q. Okay. You don't remember reviewing and approving them for
14 payment?

15 A. I don't.

16 Q. Do you know who paid them?

17 A. We would have paid. If we did pay -- I assume that we
18 did -- we would have paid and put it on the bill.

19 Q. The bill to the insurance company, right?

20 A. Well, the bill to 21 Century, which is also submitted to
21 the insurance company, but the bill is to 21 Century.

22 Q. Okay. So the bill -- let me see if I understand the
23 process.

24 The bill would have been sent to you. You would look
25 it over. You would send it to Brent Duke, and Brent Duke

1 would turn it over to the insurance company?

2 Do I got that right?

3 A. No.

4 Q. Okay. Tell me.

5 A. The bill would come to us. We would pay for it, and it
6 would go on the bill that would be submitted to 21 Century,
7 with copies going to the insurance company, and the insurance
8 company would make the payment.

9 Q. Okay. So let me go about it another way.

10 Did you ever refuse to pay 4Discovery for anything
11 they did?

12 A. I don't remember doing that, no.

13 Q. During the fact discovery phase in this case, did you ever
14 complain to 4Discovery regarding their performance of their
15 duties in connection with this case?

16 A. I don't personally remember that I did. I don't know
17 whether there was anything later in 2018.

18 Q. And that's why I limited it up to the end of fact
19 discovery, July 1st, 2015.

20 Did you ever complain "You didn't do your job right,"
21 any kind of complaint whatsoever?

22 A. No, not that I remember.

23 Q. Let's go back to Exhibit No. 65, specifically Mr. Gough's
24 letter of January 19th, 2019, Page 2, first paragraph.

25 Tell me when you are with me.

1 A. I'm sorry. What?

2 Q. So, again, we are in Mr. Gough's letter, all right? It is
3 on the screen in front of you. And that's Page 2. And I'm
4 going to -- I want you to look at the first paragraph.

5 In fact, I'm going to read it, so we can read it
6 together, all right?

7 A. Okay.

8 Q. Are you with me?

9 So it says: "After the analysis was complete, this
10 hard drive was stored in 4Discovery's long-term evidence
11 storage. When a case is moved to long-term evidence storage,
12 it is stored on a single, nonredundant hard drive. Under the
13 2014 statement of work, 4Discovery was not required to
14 maintain any electronically stored information beyond one year
15 from the last invoice date. The last invoice date on this
16 matter was February 10th, 2015. 4Discovery was not requested
17 to do any further work at that time."

18 Did I read that correctly?

19 A. You did.

20 Q. Okay. So we can agree that the fact discovery stage was
21 still open in February 2015, correct?

22 A. Yes.

23 Q. Okay. Why didn't you instruct 4Discovery to maintain the
24 electronically stored data in this case beyond the one year it
25 committed to in its statement of work?

1 A. I don't know. Just there was a reference in the letter
2 that they would not destroy anything, and that if there was
3 going to be any effort to destroy something on their part,
4 they would give advance notice. So I don't recollect why we
5 didn't go and make arrangements for it to be kept more than
6 one year.

7 Q. Okay. So we can agree you didn't tell them to store it
8 for more than one year; is that correct?

9 A. That's correct.

10 Q. And we can agree that you were on notice that you had to
11 tell them, correct?

12 A. We had to tell them if there was going to be an agreement,
13 that's right, but they had to tell us if they were going to do
14 anything with it that was going to be destructive to it. This
15 was just a question of their commitment as far as one year.

16 MR. von OHLEN: Okay. Let's go back, then, to LS-21,
17 please, which is the statement of work by 4Discovery,
18 specifically to Page 4.

19 BY MR. von OHLEN:

20 Q. I want you to look at the paragraph with the heading "Data
21 Storage and Retention."

22 Do you see that?

23 A. Yes.

24 Q. Okay. Let's just start with the first line:

25 "4Discovery retains and securely stores all

1 electronically stored information (ESI) related to this
2 agreement for a period of one year from the last invoice date
3 at no charge to the client."

4 You see that, right?

5 A. Yes.

6 Q. And "one year" is circled.

7 Do you know who circled that?

8 A. I do not.

9 Q. Was that you?

10 A. I don't remember.

11 Q. Okay. So, fair enough, they put you on notice that they
12 are going to keep it for one year, right?

13 A. That's right, without charge.

14 Q. Without charge, right.

15 And in the interest of moving this along, I'm going
16 to skip down one sentence to:

17 "4Discovery is not responsible for any ESI beyond one
18 year from the last invoice date unless the client and
19 4Discovery have executed a supplemental agreement for the
20 archival and secure storage of any ESI related to this
21 agreement."

22 Do you see that?

23 A. Yes.

24 Q. Okay. Did you ever execute a supplemental agreement for
25 storage?

1 A. I don't think we did.

2 Q. Okay. Let's stay with Exhibit 65.

3 Now, let's fast forward a few years to May 2018, and
4 this is after the Plaintiff's would have filed their original
5 motion for sanctions, and it was only then, correct, that
6 Travis Life, an attorney for your firm, contacted 4Discovery
7 and reactivated this case; is that correct?

8 A. Yes.

9 Q. Okay. And that's in Mr. Gough's report at Page 2,
10 Paragraph 2, right?

11 A. Right.

12 Q. He actually uses the word "reactivated," right?

13 A. Yes.

14 Q. Okay. And now staying with Exhibit 65, and, again, with
15 reference to the Gough letter, Page 2, Paragraph 4 -- one,
16 two, three, four -- move down towards the bottom.

17 Do you see that --

18 A. Yes.

19 Q. -- Paragraph 4? Okay.

20 And isn't it true that 4Discovery took the single
21 nonredundant hard drive from long-term storage and "The hard
22 drive was connected to a forensic workstation, but it was
23 nonresponsive and appeared to have failed. 4Discovery did
24 everything within its ability to recover as much data as
25 possible from the failed hard drive, but was unsuccessful in

1 recovering the forensic image of Brent Duke's laptop."

2 Did I read that correctly?

3 A. I believe so.

4 Q. Thus the net effect of the loss of these hard drives
5 that 4 -- or the single nonredundant hard drive that was in
6 4Discovery's possession is that there is no longer a mirror
7 image of what was on Brent Duke, Laurie Duke, Robert Hough,
8 and Bryan Kos's hard drives as of December 2014, correct?

9 A. It appears that way, yes.

10 Q. Now, this case, as we have gone over ad nauseum, was filed
11 in September of 2012, and you were retained during that same
12 month, correct?

13 A. Yes.

14 Q. Okay. Why did you wait over two years from September 2012
15 to even attempt to make a copy of the hard drives of your
16 client's computers?

17 A. We weren't involved with the process that occurred in
18 2014. We weren't involved with that process in 2012.

19 Q. I'm not sure I understand your answer.

20 You were directing this case as lead counsel, we can
21 agree with that, right, in September of 2012, right?

22 A. Yes.

23 Q. Okay. And you gave Mr. Duke instructions about
24 preservation of information and ESI, right?

25 A. Yes.

1 Q. And my question is that was in September of 2012. Why did
2 you wait to December 2014 -- that's about 26 months -- before
3 you retained somebody to make an image of those computers?

4 A. I don't understand that there is an obligation to make an
5 image, as you are suggesting.

6 Q. Okay. That there is no obligation, that people can
7 continue to use their computers, and you have no obligation to
8 ask them to make copies, is that your understanding of what
9 the obligations are?

10 A. There is an obligation to preserve, but I did not
11 understand that there was an obligation to create a copy.

12 Q. Why didn't you make the decision to create --

13 THE COURT: Do you understand that there is more than
14 just the documents, that the image captures all the metadata
15 related to the documents? Do you understand that?

16 And that documents that are entered into and edited
17 or reviewed, the metadata relating to that, all that changes?

18 Do you understand that?

19 THE WITNESS: Am I aware that copying would capture
20 that?

21 THE COURT: That if you don't image at the time, and
22 people use the devices, that it changes the information
23 relating to the documents itself; do you understand that?

24 THE WITNESS: I understand things can be overwritten.
25 Is that what you mean?

1 THE COURT: Okay. Go ahead.

2 BY MR. von OHLEN:

3 Q. Well, at least you understood that your client continued
4 to use those computers in his business in the intervening two
5 years between September 2012 and December 2014; is that a fair
6 statement?

7 A. Yes, I did.

8 Q. Okay. And as a result of using them, he is adding things
9 and perhaps subtracting things; is that a fair statement?

10 A. Well, they are not deleting. They are preserving.

11 Q. They are not supposed to, right?

12 A. They are not supposed to delete?

13 Q. Delete.

14 A. That's correct.

15 Q. Okay. And the way that we can, as lawyers, figure out
16 whether somebody is telling the truth about that is that you
17 actually obtain a copy, right?

18 A. You could.

19 Q. Or you can just rely upon their veracity, I guess; is that
20 what you are saying?

21 A. Well, my understanding is that he understood, Mr. Duke
22 understood, what the responsibility was, and he observed that.
23 He has given that commitment to us many, many times.

24 Q. Okay. And I just want to make sure that -- and maybe I
25 have asked this question, but you didn't tell him to make a

1 copy, and you believe it wasn't your obligation to tell him to
2 make a copy of what's on your hard drives or any other ESI.
3 It is just good enough that he says, "I will retain anything
4 that's material to this case." That's good enough according
5 to what you understand your obligations?

6 A. I believe I fulfilled my obligation.

7 MR. von OHLEN: Please put up Exhibit No. 66, please.

8 BY MR. von OHLEN:

9 Q. Okay. So Exhibit 66 is Defendant's status report to this
10 court's June 6, 2019, order, and the report references the
11 preliminary work done by new e-discovery vendor QDiscovery,
12 which, as you may know, was retained by the Defendants through
13 Mr. Salam after your withdraw in this case.

14 So this document was filed with the court, and it is
15 contained at Docket No. 318.

16 So before I put this up on the screen, have you had
17 an opportunity to review, take a look at this report before
18 today?

19 A. I have seen it before, yes.

20 Q. Okay. And in conjunction with preparing for this hearing,
21 right?

22 A. Yes.

23 Q. And the report is very long. Unfortunately, it speaks for
24 itself, and I just have a couple of questions regarding it.

25 And if you would like to page through it, but I think

1 you know what it contains, right?

2 It is a report of various sources of ESI that
3 QDiscovery got as a result of interviews with Mr. Duke and his
4 employees.

5 We can agree on that, right?

6 A. Yes.

7 Q. Okay. And we can agree that neither you and your firm or
8 anybody on the defense team uncovered all the sources
9 of -- potential sources, let me say, of ESI that are
10 referenced in the QDiscovery report while fact discovery was
11 open, correct?

12 A. Start again. I'm sorry. I missed the first part.

13 Q. Sure, sure.

14 They list a whole bunch of things in those reports?

15 A. Yes.

16 Q. Twitter accounts, Instagram, Yahoo!, GoDaddy, people's
17 cell phones, computers in the garage, whatever. They list a
18 lot of things.

19 You remember all of that, right?

20 A. Yes.

21 Q. And we can agree that you didn't discover that universe of
22 things while it was on your watch, before you withdrew from
23 the case, correct?

24 A. We did not search all of that; that's correct.

25 Q. Okay. Nor did you discover the existence of some of those

1 things, correct?

2 A. Some of the things, that's right.

3 Q. Okay. Now, I want to direct your attention to Page 39 of
4 the QDiscovery report.

5 39, I think it is.

6 THE COURT: Is it the going to be the Docket 39, at
7 the top?

8 MR. von OHLEN: It is so hard when I don't have the
9 paper document in front of me.

10 THE COURT: Because it is 39 pages, and the last
11 page, 39 -- well --

12 The hit report?

13 MR. von OHLEN: 13 of 39.

14 MR. DAVIS: 13 of 39.

15 THE COURT: So we are looking at Page 13 of 39?

16 MR. von OHLEN: Yes, sorry.

17 THE COURT: That's okay.

18 MR. von OHLEN: Scrivener's error, your Honor.

19 THE COURT: That's all right.

20 BY MR. von OHLEN:

21 Q. Okay. So I'm just looking at this, and, as you know, we
22 haven't had any -- well, maybe you don't know.

23 There has been no production of any of these
24 documents yet to date that are referenced in this report.

25 But take a look at the middle column where it

1 says -- at the top, it says: "Search Terms Report," and it

2 says: "Report Name: Keyterms - GoDaddy E-mails."

3 Do you see that at the top?

4 A. Yes.

5 Q. And "Searchable Set" next to it says "SS," which I'm

6 assuming means "searchable set," and then it says "GoDaddy

7 Accounts."

8 Do you see that?

9 A. Yes.

10 Q. Okay. And then down, we have various columns, and you see

11 one is "Total documents with hits," and it is "23,609," right?

12 A. I can't see those numbers on my screen.

13 Q. Okay. Let's make it a little bigger for you.

14 A. Okay.

15 Q. Do you see those numbers now, "Total documents with hits"?

16 A. Uh-huh.

17 Q. And then the next one says: "Total documents with hits,

18 including family."

19 I'm not sure what "family" means, whether it is

20 Mr. Duke's family or his business family.

21 But in any event it is "42,592."

22 And then "Total documents without hits," which is

23 "179,735."

24 Do you see all that?

25 A. Yes.

1 Q. So is it your understanding that those are the amount of
2 documents?

3 And it look like either 23,000 or 42,000 that
4 Plaintiff's search terms hit on the GoDaddy accounts?

5 A. I have no understanding of this report.

6 Q. Okay. Fair enough.

7 This was after your time on the case, right?

8 A. Yes.

9 Q. Correct?

10 A. Yes.

11 Q. But we already know that there were 15,866 pages of
12 documents that Defendants late produced on May 31st, 2018,
13 from the Yahoo! account, correct?

14 A. I think that's the right number, yes.

15 Q. Yes, I will represent to you that that's the number. I
16 don't want to go through all the Bates ranges, but 15,866.

17 And I may say "15,000" from now on, but you and I
18 know what we are talking about, what set of documents, right?

19 A. Yes.

20 Q. Okay. So my question is: When did you first learn that
21 there were even more documents than this 15,866 that were not
22 produced in discovery that were responsive to Plaintiff's ESI
23 terms?

24 A. I think that was May 29th of this year.

25 Q. 2019, correct?

1 A. Correct.

2 Q. So when you discovered that the search terms hadn't been
3 run against the Yahoo! e-mails in -- and that would have been
4 around May of 2018, correct?

5 A. Correct.

6 Q. Okay. It didn't occur to you at that time to say, "Hey,
7 let's check and see if they were run against the GoDaddy
8 e-mails"?

9 A. It did not.

10 Q. Did you talk to anybody on your team about whether that's
11 something we might investigate?

12 A. We did not have that conversation.

13 MR. von OHLEN: Okay. Your Honor, I'm about to -- it
14 is three minutes to 5:00. I'm about to change gears here.

15 What do you want me to do?

16 THE COURT: Once you change gears, how much longer
17 are you going to take?

18 MR. von OHLEN: A lot.

19 THE COURT: Well, my HP is showing 4:59. So, okay,
20 we will wrap it up for today.

21 The subpoena on 4Discovery doesn't need to be a
22 "friendly subpoena." It just needs to be a regular old
23 subpoena, and if they don't respond or if they object, file a
24 motion, get it in front of me ASAP. Give them a copy of the
25 motion. And then we will see where things go.

1 All right. So we have got Mr. Leavens's testimony.

2 You have already given notice of the order of the witnesses.

3 MR. von OHLEN: Leavens, Life, Liberman.

4 MR. SMITH: Your witness list was the other order, so
5 I thought I would ask.

6 MR. DAVIS: It is Liberman and then Life. Sorry. We
7 switched it when we released her from today.

8 THE COURT: Okay.

9 MR. von OHLEN: But Life is going next.

10 THE COURT: Okay. I just want to make sure.

11 So what's our understanding of these people?

12 MR. SMITH: And that's what I want to know. Can you
13 just give us the order?

14 THE COURT: Sure, yes, so he knows which one of his
15 clients to talk to, to get teed up.

16 MR. von OHLEN: So we will take Ms. Liberman next,
17 but I know that she's from out of town, and I know that she
18 probably doesn't want to come back twice.

19 MR. SMITH: She can be here for both days. We have
20 ascertained that already, your Honor.

21 THE COURT: Okay.

22 MR. von OHLEN: So it goes L, L, and then L.

23 THE COURT: Okay. Is Life before Liberman?

24 MR. von OHLEN: No, there isn't. There is Liberman
25 before Life.

1 THE COURT: Because I'm eyeballing this, and if
2 that's the end of you, and the end of your case, then we are
3 talking --

4 MR. von OHLEN: No, we still have Mr. Stamatis.

5 THE COURT: Right, but we are going to go through all
6 that.

7 I'm looking at the 15th, and Ms. Liberman is
8 somewhere in the mix between the 15th and the 19th.

9 We are closing shop on the 19th, right?

10 MR. von OHLEN: Well, presumably, the other
11 examinations are going to be much shorter than Mr. Duke, and
12 Mr. Leavens, who spans the whole arc, and Ms. Liberman is --

13 THE COURT: Should be relatively --

14 MR. von OHLEN: -- a smaller arc. And Mr. Life kind
15 of picks up, at least in time, after Ms. Liberman.

16 THE COURT: All right. Okay. And here is my
17 point -- true, at least that makes sense to me, and then you
18 have Mr. Stamatis, and you have Mr. Shonder, 4D, and I don't
19 know what cleanup they are doing. I don't know if Mr. Duke is
20 coming back or not.

21 My point being we are finishing up at 5:00 today. We
22 have got two days left.

23 MR. von OHLEN: Two.

24 THE COURT: Two days left, and I'm seeing at least
25 four, okay?

1 That dovetails into my point: Look, I apologize if
2 at times I seem a little short-tempered. I give plenty of
3 warnings. I probably give too many warnings, because people
4 know I give too many warnings, and then they screw around and
5 they don't listen to the first warnings. I bark before I
6 bite. So if I have to say things multiple times, it tells me
7 one of two things: One, you are not listening to what I'm
8 saying; two, you are listening to what I'm saying, you just
9 don't care.

10 And in the context of this case, with violations,
11 multiple violations of rules and court orders, look, we are
12 dancing around some issues here. Things were lost. Things
13 were lost and are not retrievable. They are gone. They don't
14 exist. I think we can all stipulate to that.

15 So in the context of all that, supplementation dates
16 being blown, fact discovery dates being blown -- you know
17 what? I forgot about that whole Haas thing, and then I had a
18 flashback of that fiasco.

19 So in the context of this case, when I say something
20 one day, repeat it that day, say something the next day,
21 repeat it that day, say it two times today, at some point, I'm
22 going to go off, all right?

23 Long fuse, but when I go off, it is big, okay?

24 So, please, when I say something, I kind of mean it,
25 okay? Just comply with those things.

1 And orders are there for a reason, my directions are
2 there for a reason, so that we can get things done, so that
3 Ms. Perkins-Reiva can get a clean transcript, so that the case
4 can move forward, and we can be done, and that this won't be
5 an awful -- a more awful situation than it needs to be, okay?

6 I will see everybody on November 15th at
7 9:00 o'clock.

8 We have currently two CVB cases scheduled. I don't
9 know if they are going to occur. If they do occur, I will
10 make short work of them.

11 I also have a pro se case that was pushed back to me
12 from one of the helpful district judges, who is taking cases
13 now, and so I need to address that. I will do that quickly
14 and get that done so that we can get through as much as we can
15 get through on Friday, November 15th, okay?

16 You are under oath. Don't talk to anybody about your
17 testimony.

18 Before we wrap up, Mr. von Ohlen, anything you want
19 to talk about?

20 MR. von OHLEN: No, other than if they can find that
21 report, and if they would tender it to us before the next time
22 I see the witness.

23 THE COURT: Okay. Mr. Smith, anything?

24 MR. SMITH: No, your Honor.

25 THE COURT: Okay. Mr. Salam, anything?

1 MR. SALAM: No, your Honor.

2 THE COURT: All right. We will see you on Friday,
3 the 15th.

4 (The hearing was adjourned to November 15, 2019, at
5 9:00 o'clock a.m.)

6 CERTIFICATE

7 I certify that the foregoing is a correct transcript from
8 the record of proceedings in the above-entitled matter.

9 */s/Heather M. Perkins-Reiva* *November 11, 2019*

10 _____
11 *Heather M. Perkins-Reiva* *Date*
12 *Official Court Reporter*

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